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Supreme Court, U.S.
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No._____

In The

Supreme Court Of The United States

Christopher A Graham

Petitioner.

-against-

AT&T Mobility, LLC,

Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

Christopher A Graham
Petitioner-
Plaintiff prose
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A. Questions Presented

1. Whether the **$7,845.23** bill of cost that was intentionally generated by needless work in order to retaliate against plaintiff, would deter a "reasonable person" from filing discrimination suit against his/her employer and cause a chilling effect on future discrimination cases?

2. Whether a clerical error committed by an EEOC intake who neglected to check the race box while setting forth the discrimination charges is ground to dismiss all discrimination charges?

3. Whether derogatory and disciplinary appraisals given to plaintiff by his managers after plaintiff filed EEOC charges, are material facts for trial?

4. Whether the district court and the court of appeals erred in applying the substantive nondiscrimination provision of the title VII to the retaliation charges in this case, in conflict with this court's clear statement in Burlington v. White that the standards are different and have a broader scope?

B. Parties to the proceedings

Pursuant to rule 14.1(b), below are all of the parties appearing here and before the United States Court of appeals for the Seventh District. The petitioner here and plaintiff is Christopher Graham.

C. Corporate Disclosure Statement

Pursuant to rule 29.6 Petitioner stated as follows: Respondent AT&T Mobility LLC is a publicly traded corporation.

C. Jurisdictional Statement

i. The decision of the United States Court of Appeals for the Seventh Circuit was entered on: September 6, 2007. The case was docketed as No. 06-3020 & 06-3734 ii The District Court has jurisdiction under 28 U.S.C. § 1331, 1343(a)(4); 42 U.S.C. §§ 2000e-2(a), and the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution. iii The Court of Appeal has jurisdiction under 28 U.S.C. § 1291, in that the decision from which this appeal is sought a Writ of Certiorari

D. Constitutional and Statutory Provisions Involved

This case involves serious violations of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a), as amended by the Equal Employment Opportunity Act of 1972 - Prohibits discrimination on the basis of race, color, religion, sex/gender, or national origin

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E. Statement of case

Plaintiff-Appellant (Graham) filed a complaint with the Equal Employment Opportunity Commission (EEOC) on April 1, 2002 and subsequently filed another complaint on October 29, 2003. On January 23, 2004 plaintiff brought an action under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a), against his employer Cingular Wireless LLC. ("Cingular"), now known as AT&T Mobility LLC. Thereafter, defendant AT&T retaliated against plaintiff and continued to discriminate against him.

The district court dismissed the retaliation charges by applying the substantive nondiscrimination provision of the Title VII to both the retaliation and discrimination charges.

The district Court also dismissed all the discrimination charges because of an error committed by an EEOC clerk who did not check the race discrimination box on the charge form he returned to plaintiff. The district court dismissed the discrimination charges because of the unchecked race discrimination box.

The district court also dismissed the case stating that there is no genuine issue of material facts for trial and on page 9 of its decision the district court stated:

> **"An adverse employment action requires a "significant" change [ ] in employment status."(emphasis added)**

and dismissed the retaliation case for this reason. Plaintiff appealed to the Seventh Circuit court of appeals. However the Seventh Circuit affirmed the lower district court's decision to dismiss the case

Question 1

1. **Wheather the $7,845.23 bill of cost that was intentionally generated by needless work in order to retaliate against plaintiff, would deter a "reasonable person" from filing discrimination suit against his/her employer and cause a chilling effect on future discrimination cases?**

The 7th Circuit Court of appeals opinion on bill of cost held:

> **1)"Graham does not challenge the reasonableness of the amount of costs or allege that AT&T conducted itself in such a manner as to ring up unnecessarily the costs incurred". 2)"AT&T took only five depositions, even with Graham's identification of over 100 witnesses in his rule 26 disclosures, and Graham took twelve depositions". 3) "AT&T further attempted to limit the scope of litigation by filing two motions to dismiss". 4) "Accordingly, based on Graham's unpersuasive rationale and the reasonableness with which AT&T conducted this litigation, the district court did not abuse its discretion in awarding AT&T cost, and we affirm its grant of costs to AT&T". (emphasis and numbers added).**

Argument to Bill of Cost

Plaintiff (Graham) did 3"challenge" the reasonableness of the whole conduct in the record ("plaintiff's response to summery judgment") not just the amount of the bill, plaintiff argued that respondent generated the bill with needless work to retaliate against him. See ***1(Kimberly Hearn Troupe v. Lord and Taylor No. 93-2523) (Seventh district)***

> **"3For it is not true that to get over the hurdle of summary judgment a plaintiff must produce the equivalent of an admission of guilt by the defendant." (emphasis added)**

Plaintiff (Graham) only has to show that the timing of respondent's retaliatory acts. Plaintiff opposed discrimination and sued plaintiff, there after respondent retaliated against him with the bill of cost. The bill of cost was AT&T's response to plaintiff's opposition to discriminatory acts and was in retaliation for what plaintiff "did".

1) The statements above made by the Court of Appeals regarding the amount of depositions is "erroneous", in the record plaintiff had 80+ witnesses but only took 7 depositions, John Coffey, Timothy Kaufenberg, Jim Gurga, Tracy Ryan, David Lindon, Cory Bolananski and Michael Morrissey, to limit litigation. It was "Respondent" however that took 11+ depositions which included the seven agents of the company listed above. Respondent (AT&T) also took deposition testimonies of Carl Blackmon and four of plaintiff's

doctors against plaintiff's objections, the extra work was in order to generate the bill of cost. The above erroneous statements do not reflect the record. Plaintiff had a large number of witnesses, which included numerous black workers who were also discriminated against and who would have testified to the facts in plaintiff's favor. Even if there were 100 witnesses as the Court stated, those witnesses would have prove the merits of this case

2) The 7th Circuit Court of Appeals seems to suggest that plaintiff should have been reasonable and stop his legal actions against respondent to avoid the bill of cost, because respondent objected to litigation and field 2 motions to dismiss the case. Should plaintiff have dropped the case to escape a bill of cost?
It is normal and common for respondents like AT&T to attempt to get the courts to dismiss discrimination suits against them because of pending liability and the potential embarrassments litigation may cause, national exposure of this case to the public regardless of the merits could negatively affect respondent's (AT&T) customers and its businesses, No American corporation wants to be known as a racial discriminator. However, Filing two motions does not relieve respondent from liability and plaintiff does not have an obligation to act in respondents favor by stopping litigation. In light of the facts in the evidence against respondent that proves discrimination in this case. Plaintiff has no obligation

to drop the case based on any threats, pressure or more retaliation from respondent.

Plaintiff's case has merit. For the courts to suggest that plaintiff should have backed off because he was being warned is wrong.

AT&T does not have the public's interest in mind it is not ran by the Government like the Police Department its only interest is that it protects itself and its image from embarrassment and liability. For the 7th Circuit to argue and set precedents by its dismissal of this case, implying that the acts of respondent in filing motions for dismissal and plaintiff's refusal to back down is a justifiable argument to dismiss this case is wrong. The argument implies that under Title VII, it is legal for a respondent (any company) to generate a bill of cost of any amount because potential plaintiffs who are "unpersuasive" and do not back down from opposition to discrimination, will be charged with a bill of cost determined by the discriminators. Left unchanged by this Court, these conclusions would set precedents that would cause a chilling affect on other Civil Rights cases. Suggesting that plaintiff in this case was unreasonable and unpersuasive and that AT&T was reasonable is not factual but is in err, a contradiction of the evidence in the record. The 7th Circuit stated below:

> **"Accordingly, based on Graham's unpersuasive rationale and the reasonableness with which AT&T conducted this**

litigation, the district court did not abuse its discretion in awarding AT&T cost, and we affirm its grant of costs to AT&T". (emphysis and numbers added)

In essence above the Court argues that, because AT&T so called did not persuade plaintiff to be reasonable, it was then justifiable for respondent to retaliate against plaintiff by charging him the $7,845.23 bill of cost? AT&T is a multibillion dollar corporation; a bill of cost for $7,845.23 represents a minuscule amount to respondent however it equates to two month salary for the plaintiff and more to other workers at AT&T and other corporations.

The $7,845.23 only serves as discouragement and a warning to this plaintiff and those like him who would consider opposing discriminatory the acts of respondent and other employers, moreover, it is common sense that the $7,845.23 "would" deter a "reasonable person" from making a charge of discrimination, since plaintiffs who usually bring these type of charges are poor and have no power in comparison to respondent. The rational that AT&T used for demanding the bill of cost is in pretext and will "dissuade a reasonable" person form opposing discrimination and filing similar claims. Even if the bill of cost was not generated in pretext it would still discourage others like plaintiff. The above 7th Circuit statements, the amount of depositions plaintiff took here is "erroneous" it

contradicts the facts in record, the Seventh District Court stated that they would not search the record due to the form in which the case was presented by plaintiff's attorney, numerous critical pieces of evidence in plaintiff's mosaic structured arguments were overlooked by the District Court and the Court of Appeals as a result of not searching or referring to the records. The facts were laid out in plaintiff's response to AT&T's motion for summary judgment, which is in the record. The statements by the Seventh Circuit above is only based on respondent's pretextual arguments, if such arguments are in the record it is not based on the facts in the record. AT&T threatened to, and did retaliate against plaintiff with a $7,845.23 bill of cost, it was intentionally generated by needless work to retaliate against plaintiff and chill and deter plaintiff and others like him from filing such lawsuits against this employer and other corporations. The $7,845.23 is not a trivial harm especially when taken in context with the other retaliatory and discriminatory acts of respondent in this case, the bill also equates to more than 4 months or more wages for any employee who makes minimum wage or less at AT&T

The bill of cost serves as a warning and discouragement for employees of AT&T in the protected class and for other minority employees of other U.S. corporations and in the public workforce. The $7,845.23 cost would have deep ramifications in that it "would" deter a "reasonable persons" from

making a claim/charge opposing discrimination and severely hurt EEOC Title VII cases.

In this case the district court's conclusion that the challenged acts have to be "swork related" to be harmful differs and severely conflicts with this court's 2006 *"Burlington v. White"* this Court's decision where the Honorable Justice Steven Breyer held that:

> **"sThe terms "hire," "discharge," "compensation," terms, conditions or privileges of employment," employment opportunities explicitly limit the substantive provision's scope to actions that affect employment or alter workplace conditions "The anti-retaliation previsions has no such limiting words." (emphasis added)**

In this case the district court by its arguments expects plaintiff to prove the guilt of respondent.

> **"As a matter of law "The anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace". (emphasis added) See *Burlington v. White Supreme Court decision No. 05-259 (cite as: 548 U.S.____(2006).***

The district court dismissed this case citing that the harms have to be work related. In this case Plaintiff (Graham) suffered harms both in and outside the workplace, and have overcame that burden, furthermore the provisions of the law does to require workplace "only" retaliation.

Misapplied Title VII Discrimination provisions

On page 12 and 13 of the district court opinion, the court stated:

> **"The Seventh Circuit has previously held that although negative performance evaluations may be evidence of discrimination, they are not alone considered to be actionable adverse employment actions." (emphasis added)**
> **"As discussed above, none of these incidents "changed graham's employment status in any way whatsoever. For this reason it is not necessary to analyze weather, taking the facts in the light most favorable to Graham, Graham can satisfy any of the other elements of a claim for retaliation" (emphasis added).**

In the above argument the court uses the Title VII discrimination provision to argue against plaintiff's retaliation and hostile work environment claims, also stating

> **"Graham has presented no evidence that the review led to any change in his employment status whatsoever". (emphasis added)**

Retaliation does not have to "effect job status" to prove liability. Based on Title VII present retaliation provisions in the law Plaintiff has presented a mosaic of evidence in his initial filing in the record to the District Court, in discovery, deposition, and his response to respondent's motion for summery judgment and in his appeal to the Seventh Circuit. In this Court's decision in *Burlington v. White* it specifically states only that

respondent acts would "discourage a reasonable person" from filing a charge. Again the district court erred in applying retaliation provisions of the law to this case instead the district court applied
Title VII discrimination provisions to plaintiff's retaliation claims in conflict with this Court's 2006 decision in *Burlington v. White*

Other harms plaintiff suffered

Plaintiff also suffered physically harms because of respondent's discriminatory and retaliatory acts, for example in the record plaintiff as a result of stress, suffered hair loss, excessive gas in his stomach leading to "GERD" (Gastro Intestinal Reflux Disorder) that he now takes medication for, for the rest of his life, he also saw a "clinical psychologist" (councilor) for stress, he has ground down all the biting surfaces of his teeth due to stress, has developed skin rashes caused by stress and have problems sleeping at nights.

The above stress related harms, his doctors; his primary doctor, dentists, dermatologist and his councilor diagnosed all harms plaintiff suffers as stress related. Furthermore, plaintiff was removed from his job responsibilities at AT&T at the order of his primary doctor due to the stress caused by respondent's continued discriminatory acts and hostile environment, all the above harms are in the record as material facts; however the district court and the court of appeals never spoke to these harms or mentioned

anything about these facts in the record. Rather, the district court cited below on page 13 putting the discrimination and retaliation claims together under discrimination provisions:

> **Graham's race "discrimination and retaliation" claims are better categorized as a hostile environment claim.**
>
> **"To survive summary judgment, Graham must show (1) he was subject to unwelcome harassment; (2) the harassment was based on his race (3) the harassment was so severe or pervasive as to alter the conditions of his work environment by creating a hostile or abusive situation; and (4) there is a basis for Cingular's liability". (emphasis added).**

1. Plaintiff was subjected to unwelcome harassment
2. Harassment was based on his race, whites were treated more favorably.
3. The harassment was severe and did alter conditions of plaintiff work environment; because he was the only one given "strict" instructions that required him to keep management informed thought his work day.
4. Based on provisions in the law AT&T is "liable" for its acts against plaintiff.

AT&T/Cingular (respondent) threaten, to retaliate against plaintiff with a $7,845.23 Bill of Cost; it was intentional generated, by needless work, in order to retaliate against plaintiff and chill or deter plaintiff and others from filing such lawsuits against this employer and other employers.

7th Circuit Erroneous statements

The 7th Circuit Court of appeals "erroneously" stated that Graham took 12 depositions and Cingular took only 5 to justify the bill of cost against plaintiff. In the record plaintiff only took 6 deposition testimonies these witnesses were (1) John Coffey (direct manager), (2) Cory Bolanonski (human resources), (3) Tracy K Ryan (human resources), (4) Timothy Kaufenberg (director), (5) Jim Gurga (manager), and (6) Michael Morrisey (technician). Against plaintiff's objections and to generate the bill of cost respondent intentionally decided to travel to all of plaintiff's doctors offices and took depositions from each of them. Respondent's decision to depose plaintiff's doctors generated unnecessary costs. Plaintiff gave respondent specific documentation from each specialist (doctor) to try to prevent costly litigation AT&T (respondent) retaliate against plaintiff with the $7,845.23 Bill of Cost; **(App. 22)** it was intentional generated by needless work, in order to retaliate against plaintiff and chill or deter plaintiff and other minorities.

Plaintiff in this case gave respondent over 800 emails and documents of direct and relevant evidence including over 80 witnesses and attempted to obtain the un-redacted SENDIS report that proves AT&T is racist based testimony of plaintiff 13 other black men that plaintiff witnessed, in hopes that respondent would recognize that there are racial discriminatory problems in it's workplace, plaintiff had also hoped that respondent would properly investigate and hold its agents, those responsible, accountable by

addressing the discrimination and punishing those individuals. Compared to respondent plaintiff is poor, on numerous occasions over his 15 year employment he has exhausted his administrative options to try and resolve the actions respondent took against him. Respondent has not given or suggested any remedies to plaintiff other than in pretext attempt to destroy plaintiff's reputation and integrity, plaintiff has suffered tremendously because of respondents hostile actions to his opposition to discrimination and retaliation and he (plaintiff) continues to suffer because of respondent's irresponsible acts.

Based on the law the $7,845.23 bill of cost would deter a "reasonable person" from filing a discrimination case against his/her employer. See *Burlington Northern & Santa Fe Railroad v. White* (No. 05-259, *decided June 22, 2006).* Although in white, her case she was fired and then reinstated with one month's back pay. In this case the $7,845.23 cost would cause a hardship for plaintiff because it equates to two months pay for him. With the present provisions the law provides relief for acts committed by a respondent that is outside the workplace, which respondent is liable. Moreover, the bill of cost would cause a hardship for plaintiff and would deter a reasonable person defined as an employee or potential applicant in or outside the workplace, see (*Burlington v. White*), The amount of $7,845.23 equates to some employees in AT&T's workforce to as much as a half a years pay. If the decision in this case is left without this court's

Question 2

Whether a clerical error committed by an EEOC intake who neglected to check the race box while setting forth the discrimination charges is ground to dismiss all discrimination charges?

The district court stated that checking the race discrimination box "provides employer with notice about the particular challenge conduct and provides an opportunity for settlement of the dispute". The plaintiff, however could proceed on the claim that is explicitly mentioned in the EEOC charge "if the claim is like or reasonably related to the EEOC charges, and the claim in the complaint reasonably could be expected to grow out of and EEOC investigation or charge." Before plaintiff made his charge to the EEOC he opposed acts of discrimination committed by respondent and told respondent of his opposition verbally and formally in writing. In the record respondent already knew of plaintiff's past complaints of continuing race discrimination.

Plaintiff is one of only two black employees in his department, previously plaintiff and the only other black employee "Carl Blackmon" both filed EEOC complaints and law suits against respondent. Respondent already knew that plaintiff (Graham) was black. The retaliation plaintiff suffered grew out of the EEOC charges that plaintiff filed of discrimination, which was described in his affidavit and the attached documents in those EEOC charges. The race

discrimination box was clearly checked in past charges. Respondent also negotiated with plaintiff which was mediated by the EEOC on his first charge. Plaintiff also had numerous meetings with respondent regarding the charges in this case and respondent knows very well the continuing circumstances of the discrimination charges in this case. In the initial EEOC charge that gave rise to this action, only the retaliation/discrimination box was checked.

The based on "race" box was mistakenly left unchecked by the EEOC clerk when he returned the form to plaintiff, this was a mistake made by the EEOC agent and overlooked by plaintiff when he signed the document. The hand written EEOC form plaintiff initially gave to the EEOC clerk was completed with the race box checked, however when the clerk typed the form and returned it to the plaintiff the race box was unchecked and plaintiff overlooked it. As a result of this, the charges, discrimination and retaliation, in the original complaint were dismissed. All the charges of discrimination and retaliation were described in the EEOC charge form that was stamped "see attachments", referring to the description of the charges attached, respondent ("AT&T") had notices of the discrimination charges from past EEOC forms and knew plaintiff was black. The race box is to notify respondent what type of discrimination charges it is being charged with. Respondent already knew of plaintiff's race, based on plaintiff's other EEOC charges and plaintiff's obvious

race (black), also based on plaintiff's past EEOC charges, the EEOC had a written determination and invitation to enter into conciliation discussions in at least one of the past EEOC charges filed by plaintiff. EEOC mediated meetings between plaintiff and respondent were unsuccessful and plaintiff sued. Respondent knew plaintiff's race (black) and knew that past EEOC charge were based on a "continuing" action for racial discrimination and retaliation, in those charges the race discrimination boxes were checked and the reason for discrimination stated on the charge form. Respondent should not escape liability for its discriminatory acts because it knew of plaintiff's continuing opposition and complaints of discrimination and the reason ("race discrimination") for the charges. In this case the district court gave plaintiff leave to file an additional complaint and amend the first complaint. In the new complaint attached to the amended complaint both the retaliation and discrimination boxes are checked. However, in the amended complaint only new charges of discrimination and retaliation were made. However the district court states that they were old charges in dismissing the case.

Respondent already knew that the plaintiff was black and that he (plaintiff) had continually opposed racial discrimination by complaining to management for numerous years. After plaintiff had exhausted his administrative options he filed several discrimination

and retaliation charges. The fact that respondent knew of plaintiff's race and was very familiar with the history of his past EEOC complaints of discrimination and retaliation, those facts should have been enough to overcome "the need to know the type of charge" argument. In light of the above facts the district court should not have dismissed the discrimination charges because of an
unchecked race discrimination box, because the case had merit.

Question 3

Whether the derogatory and disciplinary appraisals given to plaintiff by his managers after plaintiff filed EEOC charges, are material facts for trial?

There is no argument that plaintiff had an excellent work history at AT&T before John Coffey was his manager. On February 3, 2004 Plaintiff's supervisor, John Coffey, submitted a derogatory evaluation of Graham's performance for the year of 2003, which was not consistent with the reviews that Graham's prior supervisors gave him and it is in contradiction of current senior management's commendations to Graham. Moreover, this derogatory evaluation was in fact in retaliation for Graham's previous discrimination complaint and it is also based on continuing discrimination. Plaintiff Graham's supervisor, John Coffey, requires that all of Graham's e-mail be copied

to him and all other coworkers continuously throughout the day. This requirement was for Graham only. In this case respondent acts of retaliation against plaintiff is based on timing and when the acts occurred, respondent retaliated against plaintiff after he had opposed and complained to management about discrimination and filed EEOC charges. On page 6 of the lower court's decision (App. 162) it states Graham's claim concerning "strict instructions" that his supervisors required him to follow is vague

Acknowledgement of discriminatory intent

a. On page 20, starting at line 2, in John Coffey's deposition he was asked to read his review of plaintiff, EXHIBIT-3. On the second page fourth box of the 2003 review that stated "Chris needs to take ownership of decisions, responsibilities and failures by improving communications with his managers." Coffey also stated in this deposition that he wanted plaintiff to keep him better informed via e-mail or by phone. (*emphasis added*). Coffey admitted that Timothy Kaufenberg was present at the meeting and he goes on to agree when asked "so did you want him (plaintiff) to continuously e-mail you with respect to everything that occurred during the day?" "I don't remember if it was e- mail or phoning. "18Obviously, keep me better informed.". (*emphasis added*). Graham also testified that both Coffey and Kaufenberg asked him to communicate daily with his managers and coworkers.

18Based on discrimination and retaliation this "strict" requirement was for plaintiff only and was not required of any white workers in plaintiff's department" "direct evidence in the record a taped conversation between Larry Barrett and plaintiff have Barrett a union steward admitting that he Barrett and others were not required to communicate to management in this way.

b. There are two more facts that show Graham was instructed to send out daily email: 1) email was the typical means of communication and 2) plaintiff complied with management's demands and Coffey and Kaufenberg were receiving the daily emails and they were not complaining about it; moreover they did not tell plaintiff that he was not following their instructions.

c. The deposition testimony of John Coffey on December 20, 2005 "contradicts" the subsequent self-serving affidavit by Coffey or management.

34. Also on Cingular's document marked **D00533,** which is also Graham's document marked **EXHIBIT-R1-3, (App. 353)** page 2 section 2, Coffey writes "Chris needs to put forth more effort in building a better working relationship, and creating better communication between team members and management."

However, the defendant wanted the district court to believe that it did not want Plaintiff to correct his supposedly bad communications, notwithstanding the fact that this was stated in plaintiff's derogatory review and Coffey's sworn testimony. In Plaintiff's 2001 review

given to him in February of 2002 by his previous manager where he had scores of 4's in all areas out of a possible score of 5, his manager stated that he was an excellent communicator and communicated well with his coworkers.

With respect to the derogatory and disciplinary review,

On December 2,2002 at 9:32am plaintiff's supervisor John Coffey purposely withheld, an email sent to him by David Giesfeldt, a Sr. Network Engineer, commending plaintiff on the excellent work he did on his assignment in Detroit Michigan. Graham was approached by another field engineering manager, Jeffery Bartos, a witness in this case who told plaintiff that higher managers in Detroit were commending him on an job well done. When plaintiff asked Coffey why he had held on to the email for 22 days, Coffey sent the email to plaintiff saying only "here you go." Although Giesfeldt asked that the note be added to Graham's personal file by stating "I would like this note added to Chris Graham's record, neither Graham's supervisor nor management saw to it that this note was added to Graham's personal file (Exhibit R1-9 APP. 377) The note was never added to plitiff's file the note was never added to plaintiff's file.

> **"20Each type of evidence is "sufficient by itself" (depending of course on its strength in relation to whatever other evidence is in the case) to support a judgment for the plaintiff; or they can be used together cited by the 7th Circuit In *(Kimberly Hearn Troupe v. Lord and Taylor No. 93-2523). (Emphasis added)***

In 1992, the district court stated that the timing of the performance appraisal (review) served as circumstantial evidence of "illegal retaliation".

Giacoletto v. Amax Zinc Co., Inc., 954 F.2d 424 (7th Cir. 1992).

In this case the timing of the poor performance reviews came after appellant filed his EEOC charges. To sabotage plaintiff's good work, his manager Coffey withheld positive commendations from him (plaintiff) while giving plaintiff a derogatory and disciplinary review based on pretext in response to plaintiff's opposition to discrimination. Coffey's act of withholding the positive and excellent work performance of plaintiff, was based on "defamation", hostility, "discrimination" and was in "retaliation" for plaintiff's opposition to discrimination. There is no other reason for treating plaintiff in this manner while similarly situated white workers like Larry Barrett are treated more favorably.

In *Reeder-Baker v. Lincoln National Corp.*, Case No. 87-1287 (7th Cir. 1987), the plaintiff filed suit a second time, as did the plaintiff in this case, this time charging that the company was retaliating for her previous charges of discrimination and the court found in plaintiff's favor.

In *Kimberly Hearn Troupe v. Lord and Taylor No. 93-2523* the Seventh Circuit Court of Appeals stated;

> **"Circumstantial evidence is admissible too, to provide a basis for drawing an inference of intentional discrimination. Three types of circumstantial evidence of intentional discrimination can be distinguished. The first consists of suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits**

and pieces from which an inference of discriminatory intent might be drawn. Giacoletto v. Amax Zinc Co., 954 F.2d 424 (7th Cir. 1992); *Holland v. Jefferson National Life Ins. Co., 883 F.2d 1307, 1314-15 (7th Cir. 1989).* This is the most common type of evidence in an intentional discrimination case, now that employers have taught their supervisory employees not to put discriminatory beliefs or attitudes into words oral or written. Second is evidence, whether or not rigorously statistical, that employees similarly situated to the plaintiff other than in the characteristic (pregnancy, sex, race, or whatever) on which an employer is forbidden to base a difference in treatment received systematically better treatment. *American Nurses' Ass'n v. Illinois, 783 F.2d 716, 728 (7th Cir. 1986).* And third is evidence that the plaintiff was qualified for the job in question but passed over in favor of (or replaced by) a person not having the forbidden characteristic and that the employer's stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination. *St. Mary's Honor Center v. Hicks, 2749 (1993); Ayala v. Mayfair Molded Products Corp., 831 F.2d 1314, 1318 (7th Cir. 1987).* Each type of evidence is sufficient by itself (depending of course on its strength in relation to whatever other evidence is in the case) to support a judgment for the plaintiff; or they can be used together". (emphasis added)

"For it is not true that to get over the hurdle of summary judgment a plaintiff must produce the equivalent of an admission of guilt by the defendant." (emphasis added)

In this case Plaintiff was performing his job above a satisfactory level, furthermore plaintiff's new manager John Coffey testified that he only managed plaintiff for two weeks at the end of December 2002 and he had no

knowledge of plaintiff's work record for that year, he ("Coffey") did not think it was necessary as respondent AT&T requires, to inquire about plaintiff's work history to get the proper prospective of plaintiff's work performance for 2002 and before. In the deposition testimony of human resources manager Cory Balonanski she testified that she told Coffey plaintiff's manager about plaintiffs EEOC charges, based on his above actions he purposely planned to give plaintiff a derogatory and disciplinary appraisal based on his (Coffey's) personal opinions as a result of what plaintiff did. Coffey's unequal treatment of plaintiff was due to plaintiff's opposition to discriminatory treatment, Coffey could have given plaintiff an accurate appraisal based on plaintiff's actual work performance if he had taken the time to investigate plaintiff's past performance, instead he gave plaintiff a derogatory, subjective appraisal based on pretext and plaintiff's opposition (EEOC complaints) to discriminatory treatments that Coffey and management knew about.

The record shows that Coffey treated similarly situated and less qualified white workers like Darin Nordeen and Larry Barrett and others more favorable than plaintiff, in violation of Title VII laws. The above facts are in the record however the district court did not consider these facts. In the above *"Troupe v. Lord and Taylor"* the plaintiff loss her case because she could not find or did not look for any persons in comparison similarly situated to her in the same aspects. However, in this case is

different, plaintiff has 6 similarly situated white coworkers in his own work group managed by his direct manager Coffey, like Darin Nordeen and Larry Barrett and others who were treated more favorably, these facts were represented in the record that plaintiff submitted to respondent and to the district court, plaintiff saw these discriminatory acts with his own eyes and presented emails as evidence in the record. The facts are clearly represented to the court.

The district court acknowledges that plaintiff did state that "Similarly situated white workers were treated more favorably" but required plaintiff to name the similarly situated white workers and as a result dismissed the case. Plaintiff was the only black in his work group managed by Coffey and he is only one of two black workers in his department.

More Direct Evidence

Coffey's **"appraisal list"** is in the record it shows the seven technicians that reported to him including plaintiff, six of the technicians on that list are white including Larry Barrett and Darin Nordeen, plaintiff is the only black on the list. The list shows that plaintiff was treated less favorable than the white technicians in his group although he was more senior and more experienced. The list shows a (difference in treatment) between plaintiff and white workers.

Plaintiff requested the records of appraisals for the 36 similarly situated white workers, in his department,

however respondent "AT&T" refused to produce the requested documents in discovery in violation of discovery rules. The evidence above "the appraisal list" was purposely sent to plaintiff's work email and respondent demanded its destruction.

compel AT&T to produce the appraisal records. These key pieces of evidence along with the evidence already presented would have served as undeniable facts that plaintiff was treated less favorably than his similarly situated white coworkers. Plaintiff is one of only two black employees in his department his manager Coffey sent the "appraisal list" in an email to his director

Kaufenberg, that showed plaintiff at the bottom of the list 2nd to last compared to less qualified white workers. In the email Coffey told the director (Kaufenberg) "Here are the scores of my guys" or words to that effect. This list shows that Similarly situated white co-workers were treated more favorably than plaintiff.

Question 4

Whether the district court and the court of appeals err in applying the substantive nondiscrimination provision of the title VII to the retaliation charges in this case?

This Court is fully aware of its own decision in Burlington v. White where it clearly set forth its 2006 decision. This Court clearly states that the standards

for retaliation are different and have a broader scope. However, on page 9 of the district court's decision in this case the court stated that;

> **"An adverse employment action requires a "significant" change [ ] in employment status." holding that a "materially adverse employment action is something more disruptive than a mere inconvenience or an alteration of job responsibilities' (emphasis added).**

In this case the district court and the respondent (AT&T argues both retaliation and discrimination, saying that the acts against plaintiff were of mere inconvenience, stating that they were not significant enough to cause harm, The district court erred and accepted AT&T's argument and dismissed this case. Plaintiff is the only black in his work group and one of only two in his department; retaliatory and discriminatory acts in the record are not petty slights. There is sufficient evidentiary basis to support a fact finding.

This court clearly disagrees with the 7th Circuit's applied standards and application to the acts of retaliation in this case. In *Burlington v. White,* in Justice Breyer's opinion, his Honor stated;

> **"In the present context that means that the employer's action must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination". (emphisis added).**

The district court used *Burlington Industries, Inc. v. Ellerth, 524 U.S* to argue its above conclusions

regarding both retaliation and discrimination saying that there needs to be a "significant change in the status of employment". This Court disagrees with those conclusions saying;

> **"A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence such a limited construction would fail to fully achieve the anti-retaliation provision's "primary purpose," namely, "[m]aintaining unfettered access to statutory remedial mechanism." Robinson v. Shell Oil Co 519 U. S. 337, 346 (1997), (emphasis added).**

This Court stated that Burlington Industries v. Ellerth did not address Title VII's anti-retaliation provisions or discuss the scope of the general anti-retaliation at all. However the district Court uses Ellerth to argue and dismiss the retaliation charges in this case

In *Burlington v. White*, this Court also stated;

> **"At Most, Ellerth sets forth a standard that petitioner and the solicitor General believe the anti-retaliation provision ought to contain. But it does not compel acceptance of their view". Nor can we find significant support for their view in the EEOC's interpretations of the provision. (emphasis added)**

In this case the district court and the Court of appeals in many instances have erred in their own interpretation and discretions of the non-discrimination and anti-retaliation provisions, not considering the proper EEOC's interpretation of Title VII laws.

This Court held:

> **"The EEOC does list in it's 1991 and its 1998 compliance manuals that anti-retaliation is limited to adverse employment-related action, but in some manuals the**

EEOC the "[e]ssential [e]lements" of a retaliation claim along with language suggesting a broader interpretation (Reference Manual to title VII law for compliance personnel 491.2 (1972) (704(a) provides exceptionally broad protection for protestors of discriminatory practices", (emphasis added).

The district court in erred in its discretion it reverted to the anti-discrimination standards and applied it to both the retaliation and discrimination charges:

"Just as before the District Court, Graham does not demonstrate how the district court improperly applied White to his case, particularly because the standard adopted by the Supreme Court in White was already the standard in this circuit. Reconsidering in light of this case was there fore unnecessary because no change in legal standard occurred. Accordingly, the district court did not abuse its discretion in denying Graham's motion for reconsideration, and we affirm its denial of Graham's motion", (emphasis added).

Plaintiff cited in the record Burlington v. White below:

Relevant Law

The U.S. Supreme Court broadened the scope of an employment retaliation claim and made its application more liberal in *Burlington Northern & Santa Fe Railroad v. White* (No.05-259, decided June 22, 2006), where it held that an employee does not need to have suffered an **"ultimate employment decision"** – denial of promotion or termination. (*Emphasis added*). The Court affirmed the Sixth Circuit's decision in the case and held that a retaliation plaintiff must **"show that the. challenged action 'well might have' dissuaded a reasonable worker from making**

or supporting a charge of discrimination." Also, whether the employer's treatment was "reasonably likely to deter" the plaintiff from engaging in the protected activity.

In 1992, this Court said that the timing of the performance appraisal (review) served as circumstantial evidence of illegal retaliation. *Giacoletto v. Amax Zinc Co., Inc.*, 954 F.2d 424 (7th Cir. 1992). Plaintiff did show that he was adversely harmed in the record. Even if the court was correct in the manner in which it applied the discrimination and retaliation standards, plaintiff showed a mosaic of evidence that overcame the arguments and gave cause for a fact finding. For example plaintiff's direct manager Coffey testimony **"contradicted"** his affidavit, which should bring all other affidavits of respondent nto question.

On page 6 of the lower court's decision (App. 162) it states Graham's claim concerning **"strict instructions"** that his supervisors required him to follow is vague. The deposition testimony of John Coffey plaintiff's manager on December 20, 2005 contradicts the subsequent self-serving affidavit by Coffey or management and is regarding what was demanded of plaintiff and confirms plaintiff's charges. Also on AT&T's document marked **D00533,** which is also plaintiff's document marked **EXHIBIT-R1-3, (App. 353)** page 2 section 2, Coffey writes "Chris needs to put forth more effort in building a better working relationship, and creating better communication between team members and management." However, now the defendant wants this Court to believe that it did not want plaintiff to correct his supposedly bad

communications; notwithstanding the fact that this was stated in plaintiff's derogatory review.

Plaintiff's previous direct manager recognized plaintiff as an excellent worker, in plaintiff's 2001 review, before John Coffey replaced Glen Dorman plaintiff's previous manager and up to the point in time when Coffey became plaintiff's supervisor in December of 2002 plaintiff was always commended on his communication skills, his job knowledge, his dedication and his decision making EXHIBIT-R1-5 the section titled Competency Strengths it states 1. Adaptability: **"Chris copes effectively with stress and pressure"** . 2. Coach and develop people: **"Always makes himself available to help fellow technicians in the field"**. 3. Create Customer loyalty: **"Defines quality in terms of customer needs and desires".** The section titled Development Competencies it states 1. Use sound judgment: **"Takes ownership of decisions, responsibilities and failures"** 2. Leverage latest technology: **Stays abreast of new command strings and feature availability through Ericsson upgrades.** 3. Create strategic advantage: **Increase knowledge of competitive markets to anticipate market needs.**

Plaintiff also testified in deposition record that after less qualified technicians were promoted before him Coffey implied and said to him that he (plaintiff) would get promoted if he gave good head (oral sex).

REASONS FOR GRANTING THE PETITION

This case is an exceptionally important case for federal Title VII EEOC laws that have already been settled by this Court. The district court judgment should be vacated and the case remanded for further consideration on the basis of this Court's 2006 *Burlington v. White decision,* In this case a change in legal standards did occur.

H. Decisions Below.

By Memorandum Opinion dated September 6, 2007 the 7th Circuit court of appeals affirmed the district court decision and granted AT&T's motion to dismiss the case.

APENDIX

Documents	Case Number 1:05-cv-00994	Page
The District Court order granting the Bill Of Cost to the defendant	September 28, 2006	32
Seventh Circuit Order dismissing Petitioner's appeal by memorandum Dated:	September 6, 2007	33
District Court denial of Civ. P. 60 (b) motion To reconsider	July 17, 2006	45
District Court Order dismissing petition Based on summary judgment Dated:	June 21, 2006	45

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois CM/ECF LIVE,Ver 2.5
Eastern Division

Christopher Graham
Plaintiff,
v. Case No.: 1:05-cv-00994
Honorable Elaine E. Bucklo

Cingular Wireless, LLC
Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, September 28, 2006:

MINUTE entry before Judge Elaine E. Bucklo: Defendant's Bill of Costs in the amount of $7,325.60 is granted. Mailed notice (mpj,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information. For scheduled events, motion practices, recent opinions and other information, visit our web site at ***www.ilnd.uscourts.gov***.

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32. 1

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Argued May 23, 3007
Decided September 6, 2007
Before

Hon. Frank H. EasterBrook, Chief Judge
Hon. William J.Bauer, Circuit Judge
Hon. Daniel A. Manion Circuit Judge

Nos. 06-3020 & 06-3734

Appeals from the
United States
District Court for the
Northern District of Illinois,
Eastern Division

CHRISTOPHER GRAHAM

Plaintiff-Appellant,

No. 05 C 0994

v.

Elaine E. Bucklo. Judge.

AT&T MOBILITY, LLC,

Defendant –Appellee

ORDER

Christopher Graham sued his employer, AT&T Mobility, LLC ("AT&T")1, for race discrimination and retaliation. After granting AT&T's motion to dismiss, in part, and granting AT&T's summary judgment motion, the district court dismissed Graham's case. Graham appeals and we affirm

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1Graham's employer at the time he filed suit was Cingular Wireless. LLC. Cingular has been renamed AT&T Mobility LLC, and we refer to the defendant by its current name.

1.

Christopher Graham, who is black, works as a wireless technician for AT&T. In 2003, Graham filed a charge with the Equal employment Opportunity Commission (EEOC) alleging that AT&T retaliated and discriminated against him at work because of his race. After receiving a right to sue letter from the EEOC, Graham filed suit against AT&T alleging racial discrimination in violation of title VII, 42, U.S.C 2000e, et seq. After the district court dismissed Graham's complaint in March 2004, Graham appealed to this Court, but filed his appeal over a year late, and therefore we dismissed the appeal for lack of jurisdiction. See

Graham V. AT&T Wireless, LLC, No. 05-1370 (7th.Cir. Sep14, 2005). In November 2004 Graham Filed another EEOC charge alleging that AT&T had retaliated against him for filing his 2003 EEOC charge. Specifically, Graham stated that AT&T Retaliated against him by giving him a negative evaluation, directing him to send emails to his district manager and his work group about his job progress, denying the opportunity to have a union representative with him during a meeting with him regarding his evaluation and making defamatory statements to his personal injury attorney. Other specific acts Graham listed on his charge form in support of his retaliation claim were that AT&T manager made a racist comment in the presence of another employee, and the placement of a sign in his work area stated "built by Irish crew". After receiving a right to sue letter, Graham filed the present case alleging that AT&T violated title VII through a pattern and practice of discrimination and by discriminating and retaliating against him for filing his first lawsuit. AT&T filed a motion seeking dismissal of the retaliation claim in part and the race discrimination and pattern and practice claims in their entirety. The district court granted AT&T's motion, ruling that Graham's 2004 EEOC charge was only based on retaliation, that there was no suggestion in his November 2004 EEOC form that "Graham had felt discriminated against because of his race" and that the discrimination and pattern claims were outside the scope of his 2004 EEOC charge.

On November 1, 2005, Graham then filed an additional EEOC charge re-alleging the dismissed discrimination allegations as well claims of retaliation and discrimination that took place in 2004 and 2005. Following Graham's receipt of another right to sue, the district court granted Graham's motion for leave to file an amended complaint in which he set forth discrimination, retaliation, and pattern and practice claims. AT&T moved to dismiss as ultimately the race discriminated claim asserted in the amended complaint and to strike other allegations as barred by res judicata because Graham presented them in the first case. Granting the motion in part, the district court ruled that any allegations that

were within the scope of Graham's first suit were barred by res judicata and that Graham could only raise acts occurring within 300 days of his second EEOC charge.

AT&T then filed a motion for summary judgment, which the district court granted concluding that Graham had failed to establish that he had suffered any adverse employment action or that there were similarly situated employees outside of his protected class who were treated more favorably. Graham filed a motion for reconsideration, which the district Court denied, and he now appeals.

II

Graham asserts five main arguments on appeal: First, he argues that the District Court erred in dismissing his discrimination claims because of his failure to check the "race" box on the 2004 EEOC charge form was a clerical error. Next, he argues that a genuine issue of material fact exists in retaliation and his retaliation claim. Graham also asserts that the genuine issue of material fact exists regarding his pattern and practice claim. Fouth, Graham contends that the District Court misapplied the Supreme Court's holding in *Burlington Northern and Santa Fe railroad v. White___U.S.__, 126 S. Ct. 2405 (2006).* In his fifth and final argument, Graham asserts that the bill of cost the District Court awarded to AT&T should be stricken because it will have a chilling and deterrent effect upon individuals who wish to bring discrimination claims. We address each of these claims and turn.[2]

Graham contends that the district court improperly dismissed all but his retaliation claims because he checked only the retaliation box and not the "discrimination" box on his 2004 EEOC charge form. This Court reviews de novo a district court's grant of a motion to dismiss. *Payton v County of Carol, 473 F. 3d 845, 847 (7th Cir. 2007) (citation omitted).* A plaintiff generally cannot bring a

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[2]We address Graham's claim only to the extent that these arguments have been presented by his attorney in his briefs and oral argument. We make particular note of this because they're written submissions presented on Graham's behalf contained no citations to record, are scant on citations to authorities, and

contain and an inadequate jurisdictional statement and an inadequate statement of the case and contravention of Federal rules of appellate procedure 28(a)(9)(A), 28(a)(6), and 28(a)(2). It is not the duty of this Court to scour the record compensate for inadequate briefing were to make the party's argument, particularly when the party is represented by counsel as in this case. See *Albrechtsen V. Bd. of Regents of the Univ. of Wisc. Sys, 309 F.3d 433, 436 (7th Cir.2002) (citations omitted); United States v. Mclee, 436 F. 3d 751, 760 (7th Cir. 2006) (citations omitted).*

Claim in a lawsuit that was not alleged in the EEOC charge, and, while not a jurisdictional element, it is a prerequisite in which the plaintiff must comply before filing suit. *Cheek v. W. & Suburban Life Ins. C0., 31 F. 3d 497, 500 (7th Cir. 1994)(citations omitted).* This provides employer with notice about the particular challenge conduct and provides an opportunity for settlement of the dispute. *Id.* (citations omitted). The plaintiff, however they proceed on the claim that explicitly mentioned in the EEOC charge "if the claim is like or reasonably related to the EEOC charges, and the claim in the complaint reasonably could be expected to grow out of and EEOC investigation or charge." *Peter v. Renaissance Hotel Operating Co., 307 F. 3d 535, 551, 551 (7th Cir. 2002) (internal quotations and citations omitted).* At the very least, these claims must involve the same conduct and implicate the same individuals. Id. (citations omitted). While the conduct that served as the basis for Graham's discrimination claim with the same conduct that served as the basis for his retaliation claim, Graham checked only the "retaliation" box on his 2004 EEOC charge form and also specifically stated on the form that he was

"discriminated against because of retaliation." There is no suggestion in the 2004 charge that Graham was asserting that he was discriminated against because of his race. Therefore, Graham failed to satisfy the prerequisites of alleging a discrimination claim in his 2004 EEOC charge form. Accordingly, space and District Court did not err in dismissing Graham's discrimination claims based on his 2004 EEOC charge form.

We next address Graham's claims on which the District Court granted AT&T summary judgment. Review a district court's grant of summary judgment de novo. *Vallone v. CNA Fin. Corp., 375 F.3d 623, 631 (7th Cir.2004) (citations omitted).* All reasonable inferences from the evidence drawn in the light most favorable to the non-moving party. Id.

Title VII prohibits an employer from discriminating against an employee because of his race and from punishing an employee for complaining about discrimination. *42 U.S.C 2000e.2 and 2000e.3(a).* A plaintiff may prove a retaliation or a discrimination claim through the direct or indirect method. *Sun v. Bd. of Tr. of Univ. of Ill., 473 F.3d 799, 812 (7th Cir 2007); Moser v. Ind. Dep't of Corr., 406 F 3d 895, 903 (7th Cir. 2005).* To prove retaliation,

> [t]he direct method requires a plaintiff to show that: (1) [he] engaged in statutorily protected activity; (2) [he] suffered an adverse employment action taken by the employer; and (3) a casual connection between the two. Under the alternative in the right method, the plaintiff must establish a prima facie case of retaliation by showing that: (1) [he] engaged in a statutorily protected activity; (2) [he] met the employer's legitimate expectations; (3) [he] suffered

> an adverse employment action; and (4) [he] was treated less favorable than similar situated employees who do not engage in statutorily protected activity.

Moser, 406 F.3d at 903 (citations omitted). A similarly situated employees is one who is "comparable to plaintiff in all material respects,*"Crawford v. Ind. Harbor Belt R.R Co., 461 F.3d 844, 846 (7th Cir. 2006)."* Failure to satisfy any one element of the prima facie case is fatal to an employee's retaliation claim." *Sublett v. Chicago Transit Auth., 375 F.3d 552, 560 (7th Cir. 2004)).* If the plaintiff establishes a prime facie case, then the burden shifts to the defendant to present evidence of a legitimate, non-discriminatory reasons for its actions. Id. if the defendant makes that showing, and the burden shifts back to the plaintiff to show that the defendants reason his pretext, ie., a "lie" or "phony reason" for the action. *Perez v. Ill. Dep't of Corr., 488 F.3d 773, 776 "7th Cir. 2007) (citation omitted).*

Graham asserts that he raised a genuine issue of material fact regarding his retaliation claim. Specifically, from his 2004 EEOC charged Graham cites his receipt of derogatory performance reviews and being required to e-mail his supervisors and work about his job progress. From his 2005 EEOC charge, Graham cites being denied training, having a delay in receiving a laptop mount, and being passed over for promotions. Also as evidence that AT&T retaliated against him, Graham cites a comment a manager

made in the presence of another employee for which Graham was not present. [id. at 17-18] While Graham does not set forth the governing standard for a retaliation claim, based on the claims themselves, and only claim he could possibly make under the direct method was the manager's comment to another employee that "they might suspect you [for the vandalism and theft on AT&T's property] because you have at tan." This, was not made in Graham's presence nor did it referred to Graham. Therefore, this comment could not serve as a basis for Graham's retaliation claim.

As to remaining in facts Graham cites, it appears that he is attempting to proceed under the indirect method of proof. Graham, as a black person, is a member of a protected class who engaged in protected activity by filing an EEOC charge. Even assuming one or more of Graham's claim is amounts to an adverse employment action, he fails to set forth any similar situated individuals who were treated more favorably. While Graham states that "similarly situated (white) employees" were not required to communicate with supervisors throughout the day, he does not identify who those employees are and explain why they are similarly situated. For the remaining claimed retaliatory actions, Graham does not assert the existence of any similarly situated individuals. Therefore the district court

properly awarded summary judgment in favor of AT&T on Graham's retaliation claim.

Graham also argues that the district court improperly granted summary judgment on his pattern and practice claims. We find that Graham has waived his right to assert pattern and practice claim by failing to develop these arguments. See *United States v. Lanzotti. 205 F.3d 951.957 (7th Cir. 2000) (citing United States v. Berkowitz, 927 F.2d 1376, 1376 (7th Cir. 1991))* ("We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments, that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues)."). Specifically, Graham fails to elucidate which alleged discriminatory acts in his case constitute a pattern and practice of discrimination or any issues of material fact that would make summary judgment inappropriate. He also does not provide any argument beyond his conclusory statement that a fact finder is necessary to resolve this claim. As we have noted, "[t]his court is not obligated to research and construct legal arguments open to parties, especially when they are represented by counsel as in this case. "*John v. Barron. 897 F.2d 1387, 1393 (7th Cir. 1990) (citations omitted).* Accordingly, we affirm the district court's grant of summary judgment AT&T on the pattern and practice claim.

We now turn to Graham's contention that the District Court misapplied *Burlington Northern and Santa Fe Railway Co. v. White,__U.S.__.126 S. Ct. 2405 (2006).* After the District Court granted AT&T's

motion for summary judgment, Graham filed a motion for reconsideration pursuant to Federal rule of civil procedure 60 (b)(6) requesting the District Court to reconsider its summary judgment ruling in light of the United States Supreme Court opinion in White. White, however, settle a circuit split on retaliation claims, but in doing so agreed with the approach already employed by the Seventh Circuit. Id at 2415 ("we agree with the formulation set forth by the Seventh and the District of Colombia Circuits. In our view, a plaintiff must show that a reasonable employee would have found the challenge actions materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.") (Internal quotations and citations omitted). Just as before the District Court, Graham does not demonstrate how the district court improperly applied White to his case, particularly because the standard adopted by the Supreme Court in White was already the standard in this circuit. Reconsidering in light of this case was therefore unnecessary because no change in legal standard occurred. Accordingly, the district court did not abuse its discretion in denying Graham's motion for reconsideration, and we affirm its denial of Graham's motion.

Graham also cites White in support of his challenge of the district court's grant of bill of cost to AT&T. Specifically, Graham argues that the $7,845.23 in costs awarded to AT&T will "dissuade[ ] a reasonable worker from making or supporting a charge of discrimination." Id. at 2409. We reviewed a district court's imposition of costs pursuant to Federal Rule of Civil Procedures 54(d) for abuse of discretion. *Spegon v. Catholic Bishop of Chicago, 175 F.3d 544, 550 (7th Cir. 1999).* This "discretion is narrowly confined" because of the strong presumption created by [rule 54] that the prevailing party will recover costs." *Contreras v. City of Chicago, 119 F. 3d 1286, 1295 (7th Cir. 1997) (citations omitted).* Other than arguing that the award of these costs will have a different effect, Graham does not challenge the reasonableness of the amount of costs or allege that AT&T conducted itself in such a manner as to ring up unnecessarily the costs incurred. AT&T took only five depositions, even with Graham's identification of over 100 witnesses in his rule 26 disclosures, and Graham took twelve depositions. AT&T further attempted to limit the scope of litigation by filing two motions to dismiss. Accordingly, based on Graham's unpersuasive rationale and the reasonableness with which AT&T conducted this lidigation, the district court did not abuse its discretion in awarding AT&T cost, and we affirm its grant of costs to AT&T.

III

Because Graham has failed to establish that the district court improperly dismissed his discrimination claims based on his 2004 EEOC charge form. The existence of a genuine issue of material fact on his retaliation and pattern and practice claims, that the district court improperly applied White, or that the district court abused its discretion in granting AT&T costs, we **AFFIRM.**

IN THE UNITED STATES DISSTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CHRISTOPHER GRAHAM,
Plaintiff,

v.

NO. 05 C 994

CINGULAR WIRELESS, LLC,
Defendant.

ORDER

Christopher Graham ("Graham") has brought a motion pursuant to Fed. R. Civ. P. 60 (b) (6) to reopen his case brought against his employer, Cingular

Wireless, LLC ("Cingular"), under Title VII of the Civil Rights Act of 1964. Graham points to the Supreme Court's recent decision in *Burlington N. & Santa Fe Ry. Co. V. White,- U.S. -, No. 05-259, 2006 WL 1698953 (June 22, 2006)* as well as factual details that he believes the court did not consider in granting summary judgment to Cingular on all his claims.

Under the Supreme Court's decision in Burlington Northern, Graham is correct that he need not show that he suffered an adverse employment action in order to establish his claim for retaliation. Instead he must show that "a reasonable employee would have found the challenged action materially adverse," meaning it "well might

have dissuaded a reasonable worker from making or supporting a charge of discrimination.' " Id. at *10 (internal citation omitted). The Supreme Court stressed in this opinion that this is an objective test which focuses on "the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position." Id at *11.

Here, taking the facts in the light most favorable to Graham, Some of the actions of which he complains would not have been materially adverse to a reasonable person in his position. Requests from coworkers to limit the number of emails he sent, delay in receiving equipment or technical training, and a letter from his employer's attorney suggesting settlement, would not have dissuaded a reasonable person in his position from filing a charge of discrimination. Neither would having a manager from another department make the type of comment that Jim Gurga ("Gurga") made in this case. Although

Gurga's "tan" comment was distasteful and arguably racist, the comment was not made to Graham, and Graham has no evidence that this comment was even about him or directed at him. Under these circumstances, Gurga's comment would not have dissuaded a reasonable person from filling a charge of discrimination.

Even assuming that the remaining acts of retaliation of which he complains could qualify as materially adverse actions, Graham cannot establish the other elements of a cause of action for retaliation. Graham must show with respect to the remaining actions that (1) after lodging a complaint about discrimination, (2) he, and not an otherwise similarly situated employee who did not complain, were subject to the complained of-actions even though (3) Graham was performing his job in a satisfactory manner. *Wittaker v. N. Illinois Univ., 424 F. 3d 640, 647 (7th Cir. 2005) (internal citation omitted).* Graham has not provided any evidence of similarly-situated employees who did not complain of discrimination who were not ordered to email supervisors with progress updates, were not subjected to the "strict instructions" that Graham was, or were denied the opportunity to have a union representative attend a non-disciplinary meeting with them.1

Finally, even if Graham could make out a prima facie case of retaliation, then Cingular must provide a

legitimate, non-discriminatory explanation for its actions towards Graham, *Ajayi v.*

1Graham's current motion argues that Larry Barrett was a similarly-situated employee who was not required to email his supervisors about his job progress, but there is no evidence that Barrett was similarly–situated to Graham with respects to his position, level of communication with his supervisors, or conduct. It is Graham's burden to show that this evidence exists and he has not presented it. In addition evidence that Cingular had a policy which stated that it would "consider" a worker's seniority in scheduling training is not sufficient evidence to show that similarly-situated employees received training earlier than Graham.

Aramark Bus. Servs., 336 F. 3d 520, 531 (7th Cir. 2003), and Graham would then have the burden of demonstrating that Cingular's stated reason for its actions was pretextual. Id. Here, Cingular has provided a legitimate, non-discriminatory explanation for every act of retaliation of which Graham complains.2 And, even taking the evidence in the light most favorable to Graham, Graham cannot present any evidence that these reasons are pretextual. *See Hague v. Thompson Distrib. Co., 436 F. 3d 816, 823 (7th Cir. 2006)* ("pretext means a dishonest explanation, a lie rather than a oddity or

an error.' ") (quoting *Kulmani v. Blue Cross blue shield Ass'n 224 F.3d 681, 685 (7th Cir. 2000)).* Graham's strong belief that these acts were taken to retaliate against him does not relieve him of the burden of providing admissible evidence that this is the case. Even taking the evidence in the light most favorable to Graham, he cannot make such a showing. Graham's motion also argues that there is other factual evidence in the record supporting relief from my grant of summary judgment to Cingular. However, I have reviewed his Motion for

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[2]This is true even for those actions which were taken that might be viewed as disrespectful or inappropriate. Micheal Morrissey testified, for instance, that he placed the "built by Irish crew" sign on the cell tower in Graham's work area because he was proud of his Irish heritage. While this sign may have been inappropriate, there is no evidence that Morrissey placed the sign there to retaliate against Graham. The same is true for his email to union members about "ratting out" fellow union members, and Gurga's "tan" comment.

Relief in its entirety, and nothing contained therein alters the factual and legal basis for my grant of summary judgment. Graham's motion is therefore denied.

ENTER ORDER:

_____

Elaine E. Bucklo
United State District Judge

Dated: July 17, 2006

Case 1:05-cv-00994 Document 69 Filed 06/21/2006 Page 1 of 19

In the United States District Court
For The Northern District of Illinois
Eastern Division

Christopher Graham,
Plaintiff,

v. 05. C 994

Cingular Wireless, LLC,
Defendant,

Memorandum Opinion and Order

This action is brought under Title VII of the Civil Rights Act of 1964 by Christopher Graham ("Graham") against his employer, Cingular Wireless, LLC ("Cingular"). Graham has brought race discrimination, retaliation and hostile work environment claims against Cingular, and Cingular has now moved for summary judgment. For the following reasons, I grant Cingular's motion.

I.

Summary judgment is appropriate where the record and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Lexington Ins. Co. v. Rugg & Knopp, Inc., 165 F. 3d 1087, 1090 (7th Cir.1999); Fed. R. Civ. P 56 (c). I must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. *Anderson v. Liberty Lobby,Inc., 477 U.S. 242, 255 (1986).*

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Evidence presented in opposition to a motion for summary judgment must be admissible in content, though it need not to be in an admissible form. *Payne v. Pauley, 337 F.3d 767, 775 n. 3 (7th cir. 2003) (citing Stinnett v. Iron Works Gym/Executive Health Spa, Inc., 301 F. 3d 610, 613 (7th CIR. 2002)). See also Juarez v. Menard Inc., 366 F. 3d 479, 484 n.4 (7th Cir. 2004)* (noting that affidavits submitted in opposition to summary judgment must be based on personal knowledge such that they would be admissible at trial). This requirement is at the issue in this case because Graham has submitted an affidavit which contains much information that is either outside his personal knowledge, reliant on hearsay, or is speculative or unsupported opinion. Cingular has

moved to strike Graham's affidavit. While I will not strike the affidavit in its entirety, I cannot consider those portions of the affidavit that would not be admissible testimony at trial[1].

Cingular has also moved to strike Graham's response to its local rule 56.1 (a) (3) statement of undisputed facts. Some of Graham's responses to particular facts within that statement do not conform to local Rule 56.1 (b) (3) because they do not contain specific references to affidavits, parts of the record, or other

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[1]Cingular's motion to strike also argues that the exhibits attached to Graham's affidavit should be disregarded because they are not sworn and lack foundation as required by Fed. R. Civ. P. 56(e). However, in his affidavit Graham does lay foundation for these exhibits, and so to the extent they are admissible and are relevant to this case I will consider them.

supporting materials.[2] Responses that do not comply with local rule 56.1 (b) (3) make it difficult for this court to evaluate weather there are true disputes of material fact and what evidence the non-moving party

could actually present at trial to support his claims. Despite the difficulties that the non-compliant portions of Graham's responses create, I will not strike his responses in their entirety. Instead, I will not consider the portions of his responses that do not comport with the local rules.

II.

From reviewing the pleadings and submissions of both parties, the undisputed facts are as follows: Graham is employed as a wireless technician with Cingular, and has been employed by Cingular and its predecessor companies since 1993. His current department maintains Cingular's Chicago-area cellular market. Graham and Cingular's other wireless technicians are members of the communication workers of America union (CWA). In the last few years, several incidents have occurred within Cingular that Graham believes violated his rights. In 2003, Graham filed a charge with the Equal Opportunity Commission ("EEOC") (the "2003 charge") alleging that he was retaliated and discriminated against by being denied overtime, receiving and unwarranted poor performance review, and being subjected to harassment from coworkers and

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2See, for example, Graham's responses to Cingular's statements of facts nos 4, 24, 30, 39, 43, 53, 57-62, 64-70, 73, 75-77, 80, 84, 86-87, 91, 93, 98-194, 106-07, 109-10, 115-18, and 121.

Management.3 After receiving a right to sue letter, plaintiff, along with another co-worker and two Cingular dealers, filed a federal lawsuit. The lawsuit was based in part on Graham's 2003 charge alleged that Graham was retaliated and discriminated against based on his race. That lawsuit was dismissed as to Cingular and Graham in March of 2004.

In November of 2004, Graham filed another EEOC charge (the "2004 charge"0 in which he alleged that he was retaliated against for filing his 2003 charge by receiving a derogatory performance evaluation, being told by a co-worker that a manager made a racist comment, being directed to "copy of [his] e-mails and send them to his direct manager and work group," having a built by Irish crew" sign placed in an area in which he worked, being denied his request to have a union representative present during a meeting concerning his evaluation, and having "false and defamatory"

3The retaliation claim related to an earlier EEOC charge Graham filed in April of 2002, alleging he was discriminated against based on his race, in promotions, training and bonuses.

The EEOC issued a right to sue letter but Graham did not file a lawsuit based on this charge.

4Graham and Cingular disagree as to weather this dismissal was with prejudice. Nothing in the Court's order specifically states that the dismissal was with prejudice. *See Graham, et al. v Cingular Wireless, Inc., et a1., Docket Entry at 1 (N.D Ill. March 19, 2004) (Norgle, J.).* The Seventh Circuit dismissed Graham's appeal of dismissal on September 14, 2005. *See Graham, et a1. v. Cingular Wireless, Inc., Order at 1 (7th Cir. Sept. 14 2004).*

statements made about him to his personal injury attorney. That same month the EEOC issued a right to sue letter on that charge.

In February of 2005, Graham filed his initial complaint in this case, alleging Cingular discriminated and retaliated against him for his previous lawsuit. After certain of the claims in his initial complaint were dismissed, Graham filed another charge with the EEOC (the "2005 charge") in which he alleged additional acts of discrimination and retaliation by Cingular in 2004 and 2005. Shortly thereafter he received a right to sue letter from the EEOC. Graham then filed an amended complaint that included retaliation and race discrimination claims against Cingular based on the acts alleged in his 2005 charge. After Cingular filed a motion to dismiss, this Court concluded that, with respect to his race discrimination claims, only those that were within 300 day of his 2005 charge could be

brought in this lawsuit. *See Graham v. Cingular Wireless, No. 05 C 994, order at 1 (N.D. Ill. March 6, 2006).*

The parties agree that Graham now has a race discrimination claim and the retaliation claim remaining. Graham alleges that Cingular discriminated against him based on his race: (1) by requiring Graham to e-mail his supervisors and coworkers about his job progress throughout the day; (2) no co-worker Larry Barrett ("Barrett"), who e-mailed Graham in 2005 to ask him to stop sending numerous e-mails throughout the day; (3) by requiring Graham to

follow "strict instructions" from his supervisor; (4) by denying Graham has request received earlier technology training early due to his seniority as required by the union's agreement with Cingular; and (5) by being denied a receipt of a laptop mount and a cellular phone in a timely fashion.s

Graham alleges that each of these incidents also continued retaliation against him for the failing of his 2003 charge and his earlier lawsuit. In addition, Graham alleges that Cingular further retaliated against him: (1) by giving him a "derogatory performance evaluation and 2004; (2) through co-worker Daniel Delaney ("Delaney"), who e-mailed Graham in 2004 to ask him to stop sending

5There is a factual dispute between the parties as to the accuracy of each of these claims. Graham testified in his deposition and in his affidavit that his supervisor gave him oral instructions on two separate meetings to email his supervisors and coworkers about his job progress throughout the day; Cingular's witnesses testified that no such requirement was ever placed on Graham. Barrett testified that he only "asked" Graham to stop emailing him so frequently, but Graham testified that this was a directive, in part because Barrett is a high-ranking member of Graham's union. Graham's claim concerning "strict instructions" that his supervisors required him to follow is vague, but he and Cingular's witnesses dispute weather he was supervised differently than other co-workers. With respect to training, Cingular's Witnesses testified that it was not required to and did not normally schedule technical training according to seniority. Witnesses testified that testified that plaintiff eventually received the training before at least one employee with more seniority. Graham testified that this training should have been scheduled with regard to seniority and that he was disadvantaged by receiving it later. Finally, Graham's supervisor testified that he provided Graham with a laptop mount and phone as quickly as he was able, although it took slightly longer than Graham wanted. Graham by contrast testified that his supervisor could have ordered the equipment more quickly but chose to delay.

him copies of his emails at the end of the day; (3) though union steward and co-worker Michael Morrissey ("Morrissey"), who emailed Graham and all other union members in 2003 to tell them that "ratting people out" could result in dismissal from the union or from Cingular;6 (4) through Jim Gurga ("Gurga"), a manager-level Cingular employee from another department who told Graham's co-worker that the co-

worker might be suspected of vandalism because he "had a tan;" (5) through Morrissey, who placed a sticker with the words "built by Irish Crew" at a cellular site located in Graham's work zone; (6) by denying Graham's request to have a union representative present when he met with his supervisor regarding his "derogatory" performance review; and (7) through a Cingular attorney who made a "false and defamatory" statement about Graham in a settlement letter sent to Graham's personal injury attorney.[7] Graham also generally alleged complaint at all of these incidents created a hostile work environment for him. For the

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[6] allegations concern of this e-mail were not a part of Graham's EEOC charge and any charge relating to this email would have been outside the 300 day time limit for bringing a charge since e-mail is sent on November 18, 2003, and Graham next EEOC charge was filed in November of 2004. 42 U.S.C.A. 2000e-5 (e) (1) (2006). For that reason, Cingular argues it should be dismissed as time-barred. I agree, although even assuming it were not time-barred it cannot support a claim for retaliation for other reasons.

[7]There is also as factual dispute between the parties as to what occurred with respect to some of Graham's retaliation claims.

reasons set forth in this opinion, I find that summary judgment to each of these claims is appropriate for Cingular.

III.

I first addressed Graham's racial discrimination claims. An initial question is weather Graham can proceed under the direct method of proof or weather Graham must rely on the indirect method set forth in *McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).* Graham has presented no direct evidence that any of the actions described above were taken specifically to discriminate against Graham because of his race, and there is no "convincing mosaic' of circumstantial discrimination by a decision-maker. *See Jordan v. City of Gary, Indiana, 396 F. 3d 825, 832 (7th Cir. 2005) (citing Rhodes v. Illinois Dep't of Transportation., 359 F.3d 498, 504(7th Cir 2004). Troupe v. May Dep't Stores Co., 20 F.3d 734, 736 (7th Cir. 1994)).* Therefore, he must proceed under the indirect method of proof. To establish a prima facie case under that method, Graham must show: 1) that he is a member of a protected class; 2) he was performing his job satisfactory; 3) he suffered an adverse employment action; and 4) Cingular treated similarly-situated employees outside of Graham's class more favorably. *O'Neal v. City of Chicago, 392 F.3d 909, 911 (7th Cir. 2004).* If he can establish this is the case, then Cingular must provide a legitimate, non-discriminatory explanation for the actions it took with respect to

Graham. *Ajayi v. Aramark Bus. Servs., 336 F. 3d 520, 531 (7th Cir. 2003).* If Cingular can do so. Then it is Graham's burden to show that Cingular's stated reason was pretextual. Id.

Cingular contends that Graham cannot meet the third or forth prongs of this test.[8] I agree that Graham cannot show that any of the alleged instances of racial discrimination were accompanied by or constituted an adverse employment action. An adverse employment action requires a "significant" change[ ] in employment status." *Burlington Indus., Inc. v. Ellerth, 524 U.S 742, 761 (1998). See also Rhodes, 359 F. 3d at 504 (citing Crady v. Liberty Nat'l Bank and Trust Co. of Indiana, 993 F.2d 132, 136 (7th Cir. 1993))* (holding that a "materially adverse employment action is something more disruptive than a mere inconvenience or an alteration of job responsibilities' "). None of the incidents that Graham points to in his lawsuit constitute adverse employment actions. They did not change the terms of Graham's employment, and Graham has not alleged that these incidents were accompanied by some other change in employment terms. Graham admits that, other than his performance evaluations, Cingular has never disciplined, reprimanded, or suspended him.

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[8]There is no dispute here that Graham is an African -American, thus satisfying the first prong, and Cingular does not argue that Graham was not performing his job satisfactorily.

[9]Graham also stated in his deposition that he has never applied for a promotion while at Cingular

because he has "been stuck in this position" and was "afraid that [he] might be fired"

likewise, even considering the evidence in light most favorable to Graham, he cannot show that Cingular has treated similarly-situated employees outside of his class more favorably. To that another employee is similarly situated to him, Graham must show that there is someone who is directly comparable to [him] in all material respects." *See Patterson v. Avery Dennison Corp., 281 F.3d 676, 680 (7th Cir. 2002). " [A] Court must look at relevant factors." Radue v. Kimberly-Clark Corp., 219 F.3d 612, 617 (7th Cir. 2000).* Assuming, as Graham does, that the conduct of which he complains was disciplinary in nature, Graham "with respect to performance, qualifications, and conduct" was treated differently. *Peele v. Country Mut. Ins. Co., 288 F,3d 319, 330 (7th Cir. 2002) (citing Radue, 219 F. 3d at 617).* Here, even taken the facts in the light most favorable to Graham he has made no such showing. Graham contends in his affidavit that white employees were not required to e-mail their supervisors and coworkers about their job progress throughout the day and were not monitored as strictly as he was, but he presents no evidence of this. He states in his affidavit, without support, that a particular employee was not reprimanded for traveling to worksites

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if he left his current position for one where he was not "somewhat protected by the union." He has presented no evidence from which a finder of fact could conclude that he has been denied promotion, however.

alone in violation of Cingular's rules, but he provides no evidence that this employee was similarly situated to him. Likewise, Graham admits that after he complained to Barrett about his email, Barrett sent a similar email to the rest of the department asking that they do the same.[10] Other than stating in his affidavit that it is "normal practice" for Cingular to schedule training by seniority, Graham has presented no evidence of similarly situated employees who were offered training earlier than he was, and a Cingular employee responsible for the technology training of which Graham has complained testified that other employees with more seniority than Graham received the training after Graham. Finally Graham eventually received both the laptop mount and cellular phone he requested, and while he has identified other white employees who receive these items, he has provided no evidence that any similarly-situated employee received these items more quickly than he did.[11]

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[10]Further, Barrett stated in an affidavit that he previously sent a similar e-mail to Delaney, a white co-worker, requesting that Delaney send fewer e-mails to him. Cingular has not produced a copy of this e-mail.

11Graham does allege (without evidentiary support) that other white co-workers with less seniority that he were given newer cell phones before he was, but he does not provide any evidence it took these employees less time to receive these cell phones, or that these employees had the same duties or were otherwise similarly situated to him.

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Because, even taking the evidence in the light most favorable to him, Graham cannot show that he suffered either an adverse employment action or that he was, his race discrimination claim cannot survive summary judgment.

IV.

I next consider Graham's retaliation claim. The test for Graham's retaliation claim is similar to the test for discrimination; he must show that (1) after lodging a complaint about discrimination, (2) he, and not otherwise similarly situated employee who did not complain, was (3) subjected to an adverse employment action even though (4) he was performing his job in a satisfactory manner. *Wittaker v. Northern Illinois Univ., 424 F.3d 640, 647 (7th Cir. 2005) (citation omitted).* For the reasons discussed above, the incidents that Graham points to as subjecting him to discrimination likewise do not establish a retaliation claim because Graham has not shown that he was subjected to an adverse employment action. In

addition, the other incidents that Graham argues establish retaliation do not meet either of these requirements. The Seventh Circuit has previously held that although "negative performance evaluations may be evidence of discrimination, they are not alone considered to be actionable adverse employment actions." *Beamon v. Marshall & Ilsley Trust Co., 411 F. 854, 862 (7th Cir. 2005) (citing Haywood v. Lucent*

Techs, Inc., 323 F. 3d 524, 532 (7th Cir. 2003)).[12] As discussed above, none of these incidents changed Graham's employment status in any way whatsoever. For this reason, it is not necessary to analyze weather, taking the facts in the light most favorable to Graham, Graham can satisfy any of the other elements of a claim for retaliation.

V.

Graham's race discrimination and retaliation claims are better categorized as a hostile environment claim. Graham did allege in his amended complaint that he was subjected to a hostile work environment, with specific incidents of which he complains as purported evidence of that hostile environment. For his hostile work environment claim to survive summary judgment, Graham must show (1) he was subject to unwelcome harassment; the harassment was based on his race; (3) the harassment was so severe or perversive as to alter the condition of his work environment by creating a hostile and abusive

situation; and (4) there is a basis for Cingular's liability. *Smith v. Northeastern Illinois Univ., 388 F.3d 559 (7th Cir. 2004).* In evaluating the severity and pervasiveness of conduct, I should consider "all the circumstances, including the frequency of the discriminatory conduct; its

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12Graham argues that this performance review constituted "discipline" which might be viewed as an adverse employment action. Regardless of how the review is defined, however, Graham has presented no evidence that the review link to any change in his employment status whatsoever.

severity; whether it is physically threaten or humiliating, or a mere offensive utterance; and what it unreasonably interferes with an employees work performance." *Id. (citing Russell v. Bd. of Trs.of Univ. of Illinois at Chicago, 243 F. 3d 336, 343 (7th Cir. 2001)).* Environment must be "one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Cerros v. Steel Techs., Inc., 288 F.3d 1040, 1045 (7th Cir. 2002).*

Of all the incidents of which Graham complains, only some could even be seen as

"harassment," and taken together as a whole they were not so severe and persuasive as to alter Graham's conditions of employment the e-mails Delaney and Barrett sent requesting Graham limit the amount of e-mail he sent per day cannot be seen as either independently harassing or as part of a campaign of harassment.[13] Likewise, the letter that Cingular's attorney sent

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[13]The email from Barrett, which was sent only to Graham, stated:
With all the e-mails we receive throughout the day, why must you send everyone the status of each site? This information could be sent in one lump sum if you believe it is important. I for one don't need to see this [sic] our supervisor and systems should get it. Graham makes the unsupported allegation in his affidavit and response to Cingular's statement of facts that Barrett was a person with authority within the union and therefore could control personnel decisions within Cingular, but without supporting evidence that this is the case I cannot consider Barrett to have any status other than Graham's coworker.

The e-mail from Delaney, on which Graham's department was

to Grahams attorney which accurately pointed out that a lawsuit Graham had recently been dismissed was not "harassment" but rather an attempt by Cingular to reach a settlement with the Graham about his numerous complaints. A reasonable person would not view these occurrences as hostile or abusive. *Cerros, 288 F. 3d at 1045.*

The remaining incidents can be divided into two categories: incidents in which Graham's supervisors allegedly harassed him by giving him a derogatory performance evaluation, not allowing him to have a union representative join a meeting about that evaluation, requiring him to follow "strict instructions, and by denying his requests for training and equipment), and incidents in which Graham's coworkers harassed him (through the e-mail sent to union members warning against "ratting" each other out; the statement made by the manager-level employee; and the "Built by Irish crew" sign).

Those actions taken by his supervisors are all seemingly race neutral, so Graham must show that they are "sufficiently connected to race" in order to show that they were based on his race. *See Beamon, 411 F.3d at 863-64.* Here, even taken the facts in the

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carbon copied, stated:

Chris, can you send out one email at the end of the day for the sites you have completed? Thanks. . . its [sic] help keeps the mail box down to a minimum, with

all the Santos email now. . . its [sic] gets kind crazy . . .

light most favorable to Graham there is no evidence that these actions were based on his race. Graham attempts to impute a racial motive on his supervisors by providing an unsupported account in his affidavit about an incident in which one of his supervisors became angry upon seeing a picture showing the supervisors had superimpose onto a picture of African-American character from the television show "Sanford and Son." Even if this unsupported account were true (and even assuming Graham is qualified to testify about how the supervisor felt about this picture, which he is not) this alone is not enough to provide a racial motive for any of the actions taken by his supervisors. Likewise, Graham states (without any support) then another of his supervisors deliberately assigned him to a high crime work location on the south side of Chicago, but this also does not provide sufficient evidence of a racial motive.

Taken the facts in the light most favorable to Graham, the incidents involving the behavior of Graham's co-workers and non-supervisors are less race neutral. [14]Morrissey's "built by Irish crew" sign and Gurga's comment about a coworkers tan are more race-specific and potentially were motivated by race. However, neither Morrissey or Gurga supervised Graham. Even assuming that

[14]There is little evidence that the mail Morrissey sent that warned against "ratting" out coworkers was motivated by race, and regardless, Graham does not allege that it was, instead arguing that the e-mail was to retaliate against him for filing a claim against Cingular. That Morrissey was involved in the "built by Irish crew" sign is not enough to suggest this e-mail was motivated by race.

Graham could show all the other elements for a hostile work environment based on the statements,[15] Cingular would still have an affirmative defense for these acts if it could show that (a) it exercise reasonable care to prevent and correct promptly any harassing behavior, and (b) that Graham unreasonably failed to take advantage of any preventative or corrective opportunities provided by Cingular. *See Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998)* (setting out this defense in the context of a sexual harassment claim). In this case it is not disputed that Cingular has a written equal employment policy and provides training to employees which covers its anti-discrimination in an anti-harassment policy. Cingular also has an ethics hotline and its human resources Department investigate claims of discrimination and harassment. It is undisputed that Graham was aware of these resources; he made several complaints to the human resources department which were investigated.

15These statements, in and of themselves, do not establish a hostile work environment. Neither of the statements were made directly to Graham; he saw the sign at a Cingular worksite and heard about the tan comment from a co-worker. The Seventh Circuit has previously held that "second-hand harassment" has a lesser impact then harassment directed at the plaintiff, such that it is more difficult to establish a hostile work environment claim based on such statements. *See, e.g., Smith, 388 F.3d at 566-67* (finding no hostile work environment where plaintiff was informed by her clerical staff that another employee used a racial epithet in referring to her on several occasions).

16Graham complained to Cingular's human resources department about both his performance review in the "built by Irish crew" sign. In both cases the incidents were investigated and some

"built by Irish crew sign" to Cingular's human resources department. The sign was removed either "immediately" or within the next day or two, according to different information within the record. A Cingular supervisor stated in his deposition that Morrissey was reprimanded for the incident. 17Likewise, Graham has presented no evidence that he or anyone else ever complained to Cingular about Gurga's "tan" Comment. 18Other incidents of which Graham complains also went unreported. 19Therefore, there is no basis for Cingular's liability for any of the incidents of which

Graham complains. *See Williams v. Waste Mgmt. of Illinois, Inc., 361 F.3d 1021, 1029 (7th Cir. 2004)* (finding no basis for employer

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Action was taken. Graham does not dispute that these complaints were investigated but does dispute weather Cingular took appropriate action in response.

17In his response to Cingular's statement of facts Graham contests, without support, that the employee was not reprimanded.

18Graham contests in his response to Cingular's statement of facts that this statement went unreported, saying that "plaintiff confirmed the incident" in "the email made to Human Resources." However, Graham does not specifically cite to such an email, and as far as the court can determine no such email is attached anywhere to Graham's affidavit or response to Cingular's statement of facts. In Graham's affidavit he does not specifically state that he complained about this statement. Therefore, there is no dispute of material fact that this statement went unreported.

19Graham presents no evidence (or even an allegation) that he complained to the human resources department or the ethics hotline about the order in which he received technical training, the time it took for him to receive equipment, or Morrissey's email about "ratting out" fellow employees. He did complain about the emails Barrett and Delaney sent requesting he limit the number of emails that he sent; Cingular's

human resources department determined that those emails were not improper.

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Liability where employer took action after receiving complaint even though "the investigation was by no means textbook in its execution" and may have been imperfect"). See also Berry v. Delta Airlines, Inc., 260 3d 801 (7th Cir. 2001) ("if an employer takes reasonable steps to discover and rectify the harassment of its employees. . . it has discharged its legal duty.") Citation omitted). For these reasons, even considering the facts in the light most favorable to Graham, any hostile work environment Graham may have must fail.

IV.

Because Graham cannot establish a prima facie case of retaliation, race discrimination of hostile work environment, I need not to go further and consider weather Cingular provided a legitimate, non-discriminatory explanation for its actions, and weather Graham can show that these reasons were pretextual. Considering the facts in the light favorable to Graham, Graham cannot show that Cingular has violated Title VII, and I grant Cingular's motion for summary judgment.

Enter Order

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Elaine E. Bucklo
United State District Judge

Dated: June 21, 2006

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No. 07-1020

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CHRISTOPHER A. GRAHAM,

Petitioner,

v.

AT&T MOBILITY, LLC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition regarding the Seventh Circuit's Opinion affirming the District Court's award of costs?

II. Whether Petitioner has presented compelling reasons to grant the Petition regarding the Seventh Circuit's Opinion affirming the District Court's dismissal of his race discrimination claims?

III. Whether Petitioner has presented compelling reasons to grant the Petition regarding the Seventh Circuit's Opinion affirming the District Court's grant of summary judgment on his remaining race and retaliation claims?

IV. Whether Petitioner has presented compelling reasons to grant the Petition regarding the Seventh Circuit's Opinion affirming the District Court's denial of his Rule 60 (b) (6) motion to reconsider?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent AT&T Mobility, LLC, formerly Cingular Wireless, LLC, is a limited liability corporation owned by:

SBC Long Distance, LLC - Delaware limited liability company. Principal Place of Business: 5850 West Las Positas Blvd., Pleasanton, CA 94588. Sole Member: SBC Telecom, Inc., a Delaware corporation. Principal Place of Business: 175 East Houston Street, San Antonio, TX.

SBC Alloy Holdings, Inc. - Delaware corporation. Principal Place of Business: 175 East Houston Street, San Antonio, TX.

AT&T Mobility Corporation – Delaware Corporation. Principal Place of Business: 5565 Glenridge Connector, Atlanta, GA 30342.

BLS Cingular Holdings, LLC - Georgia limited liability company. Principal Place of Business: 1155 Peachtree Street, N.E., Atlanta, GA 30367. Members:

(a) AB Cellular Holding, LLC, a Delaware limited liability company. Principal Place of Business: 1155 Peachtree Street, N.E., Atlanta, GA 30367. Members: (1) BellSouth Mobile Data, Inc., a Georgia corporation. Principal Place of Business: 1155 Peachtree Street, N.E., Atlanta, GA

30367. (2) RAM Broadcasting Corporation, a New York corporation. Principal Place of Business: 1155 Peachtree Street, N.E., Atlanta, GA 30367.

(b) Wireless Telecommunications Investment Company, LLC, a Delaware limited liability company. Principal Place of Business: 1155 Peachtree Street, N.E., Atlanta, GA 30367. Member: BellSouth Mobile Data, Inc., a Georgia corporation.

(c) BellSouth Mobile Data, Inc., a Georgia corporation. Principal Place of Business: 1155 Peachtree Street, N.E., Atlanta, GA 30367.

All of the companies listed above are subsidiaries of AT&T, Inc., and none are traded publicly. AT&T, Inc. is a publicly traded company, and there is no one person or group that owns 10% or more of the stock of AT&T, Inc. No third party has a financial interest in this case.

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COUNTER STATEMENT OF THE CASE

A. Factual Background

1. Petitioner's Employment with Respondent

Petitioner Christopher Graham ("Petitioner") is employed as a wireless technician with AT&T Mobility, LLC ("AT&T Mobility") in its Field Engineering Department.[1] App. 67, ¶ 2; App. 159.[2] He has been employed with AT&T Mobility or one of its predecessor companies since 1993. App. 67, ¶ 1; App. 159. The Field Engineering Department is responsible for maintaining the Chicago, Illinois cellular market for AT&T Mobility. App. 67-8; ¶ 3; App. 159. At all times relevant to this lawsuit, Petitioner's supervisors were John Coffey (November 2002 to March 2005) and David Lindon (January 2005 to present). App. 68, ¶ 6; App. 69, ¶ 9. From the beginning of Petitioner's employment through the relevant time period covered by this lawsuit, Petitioner was never denied a promotion, suspended, disciplined, or even reprimanded in any fashion. App. 68, ¶ 4; App. 95, ¶ 118; App. 165.

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[1] AT&T Mobility LLC was formerly Cingular Wireless, LLC, the named defendant in the proceedings in the lower courts.

[2] Citations to "Pet." Refer to the Petition for a Writ of Certiorari filed herein. Citations to "Pet. App." refer to the Appendix filed with the Petition. Citations to "App." refer to AT&T Mobility's appendix filed in the Seventh Circuit Court of Appeals. Citations to "R." refer to the Record in the Seventh Circuit Court of Appeals.

2. AT&T Mobility's Equal Employment Opportunity Policies

AT&T Mobility has at all relevant times maintained a comprehensive equal employment policy which prohibits discrimination, retaliation, and harassment based on race, color, gender, age, national origin, religion, pregnancy, physical or mental disability, and any other protected class. App. 70, ¶ 14; App. 173. This policy is contained within the organization's Code of Conduct, which is distributed to all employees. *Id.* The policy explains how employees may make complaints of discrimination, harassment, or retaliation, and details to whom such complaints should be made. *Id.* AT&T Mobility also has an Ethics Hotline available to all employees to report complaints about discrimination, which are then investigated and resolved. App. 70, ¶ 17; App. 173. Petitioner was aware of these resources, and had made several complaints to human resources which were investigated. App. 76-7, ¶¶ 36-7; App. 80-1, ¶¶ 54-7; App. 82, ¶¶ 63-4; App. 85-6, ¶¶ 79, 82; App. 173-74.

3. Workplace Incidents Related to Petitioner's Lawsuit

Petitioner based his lawsuit on several discrete occurrences between 2003 and 2005. According to Petitioner, on March 17, 2003, in reference to an incident of vandalism, James Gurga, an Operations Manager, purportedly stated to Petitioner's co-worker Dan Delaney, "they might suspect you because you have a tan." Gurga does not directly supervise Petitioner. App. 82-3, ¶ 67. Petitioner learned of this alleged comment from co-worker Carl Blackmon, who was

present during the conversation. *Id.* Gurga did not make the alleged comment to Petitioner. Petitioner was not present when the comment was allegedly made and Gurga did not mention Petitioner when he allegedly made the comment. App. 83, ¶ 69, App. 202. Petitioner never complained to human resources about this comment. App. 83, ¶ 70.

On November 18, 2003, Petitioner's co-worker Michael Morrissey, in his capacity as a union steward, sent an e-mail to his co-workers who were union members which stated, among other things, that the union frowns upon employees "ratting out" other employees. App. 84, ¶ 71. Morrissey's e-mail was communicating information he had recently learned at a union steward training meeting and the comment in the e-mail had nothing to do with Petitioner. App. 84, ¶ 71, 73. When he sent the e-mail, Morrissey was unaware Petitioner had filed an EEOC charge or that he had complained about discrimination. App. 84, ¶ 74. Petitioner did not complain to human resources about the e-mail. App. 84, ¶ 72.

In early 2004, Petitioner received his 2003 performance evaluation. App. 75, ¶ 33. Petitioner received satisfactory ratings and had no objection to the numerical ratings in the reviews, just the comments. *Id.* Petitioner met with Coffey, his supervisory at that time, and Timothy Kaufenberg, the Director of Network Operations for Illinois, to discuss the evaluation. App. 75-6, ¶ 34. Petitioner disagreed with some of the statements in the evaluation. App. 76, ¶ 35. Specifically, Petitioner objected to the following statement: "Continued efforts toward staying abreast of changing

technology and retention of job knowledge could improve Chris's effectiveness when working in ambiguous situations." *Id.* He also objected to the statement that "Chris needs to consider feedback as an opportunity to learn from others' experiences and respond appropriately with internal groups. He needs to foster a better working relationship with his peers to identify opportunities for professional growth and development." *Id.* This type of feedback in a performance evaluation was consistent with that given to others, and white employees had been advised in their performance reviews to communicate better and to keep their managers apprised of their activities. App. 77, ¶ 39. The overall ratings or comments received by Field Engineering Technicians on their performance appraisals do not affect their salary, raises, bonuses or job assignments. App. 77, ¶ 41.

Petitioner complained to Senior Human Resources Manager Corinne Bolanowski about his evaluation and requested a meeting with her and an investigation of all of the statements in the review. App. 76, ¶ 36. Bolanowski investigated the complaint, including asking Coffey to substantiate the comments in the evaluation. App. 76, ¶ 37. Coffey did so, and Bolanowski determined the appraisal was in order and she communicated this to Petitioner. *Id.* Bolanowski offered to meet with Petitioner several times. App. 76-7, ¶ 37. Petitioner stated he would not attend the meeting without union representation. App. 87, ¶ 85. Bolanowski responded she could not grant that request because this was not a disciplinary meeting in which union representation would be allowed. *Id.* Petitioner then refused to meet with her. *Id.*

In the spring of 2004, following his receipt of his 2003 performance evaluation, Petitioner started sending e-mails to his co-workers informing them of his daily work activities. App. 78, ¶ 43. Petitioner admitted he was not required to do so, but rather chose to send the e-mails on his own initiative. App. 78, ¶ 45. Lindon did not require Petitioner to send out daily e-mails about his work schedule. App. 79, ¶ 49. Petitioner made no complaint to human resources that he had allegedly been required to send such e-mails. App. 78, ¶ 47.

In or about March 2004, Morrissey placed a small "built by Irish crew" label on a temporary movable cell tower he had personally built with another employee. App. 85, ¶ 77. Morrissey did not know the movable cell tower would be temporarily assigned to one of Petitioner's sites. *Id.* Petitioner complained to Bolanowski about the "built by Irish crew" label. App. 85-6, ¶ 79; App. 173-74. She investigated the allegations and spoke to Kaufenberg. App. 85-6, ¶ 79. Kaufenberg then told Morrissey to remove the label, which was immediately done. *Id.* Bolanowski directed that Morrissey be coached regarding the incident. Morrissey was reprimanded by Kaufenberg regarding his actions, and coached not to place any such labels on any cell sites in the future. *Id.* Petitioner never saw any label like it again. App. 86, ¶ 82.

On October 13, 2004, Dan Delaney, one of Petitioner's co-workers, sent Petitioner an e-mail requesting Petitioner consolidate his multiple e-mails sent to the Department throughout the day into one e-mail per day. App. 81, ¶ 60, App. 170-71. Petitioner responded negatively to Delaney's e-mail, and Delaney

sent Petitioner a reply apologizing for his initial e-mail. App. 81, ¶ 61. Even though Delaney apologized for sending the e-mail, Petitioner was not satisfied because Delaney did not copy the entire department on the apology. *Id.* Petitioner complained to Bolanowski regarding Delaney's e-mail. App. 82, ¶ 63. After receiving the complaint, Bolanowski asked Petitioner whether the issue was resolved based on Delaney's apology. App. 82, ¶ 64. She determined there was nothing discriminatory or inappropriate about Delaney's request. *Id.*

In July 2005, Petitioner requested a laptop computer mount for his van. App. 89, ¶ 94; App. 170-71. Such equipment was not available from AT&T Mobility's regular supplier, which resulted in a delay in obtaining the mount. App. 93-4, ¶¶ 109-10. Petitioner ultimately received the mount, and is the only technician with such equipment. App. 94 ¶ 115. In October 2005, Petitioner told Lindon his cell phone was not working, and Lindon said he would get it repaired. App. 92, ¶ 106. Petitioner believes it took too long for Lindon to get the phone repaired. App. 92, ¶ 107.

During the period from September to November 2005, all of the approximately 38 technicians in the Field Engineering Department were required to attend Ericsson "UMTS" training. App. 90, ¶ 97. Pursuant to company policy and the collective bargaining agreement, when all employees in a department are being trained, such training may be scheduled without regard to seniority. App. 92, ¶ 102. When training is offered to only a subset of employees, it must be scheduled in order of seniority. *Id.* The training at issue was required of all

employees and therefore did not need to be scheduled based on seniority. App. 90-92, ¶¶ 97-98, 100, 102. As a result, AT&T Mobility was not obligated to schedule Petitioner in the first training class. *Id.* In fact, more senior white employees attended the training after Petitioner. App. 90, ¶ 98. Because the UMTS system was not even launched until December 2005, there was no advantage to being among the earliest technicians to attend the UMTS training. App. 90-91, ¶ 98. Petitioner did not complain to human resources regarding the scheduling of his training. App. 92, ¶ 104.

On October 25, 2005, Larry Barrett, one of Petitioner's co-workers, sent an e-mail to Petitioner asking him why he sends out separate e-mails on the status of each of his sites to the entire department rather than in one communication. App. 79, ¶ 51. Petitioner complained to Senior Human Resources Manager Tracy Ryan about Barrett's e-mail. App. 80, ¶ 54. Ryan investigated the complaint. App. 80, ¶ 55. She spoke to Barrett, who stated he had e-mailed Petitioner and asked him to attempt to consolidate his e-mails and that he also sent an e-mail to the entire team requesting they do the same. *Id.* As part of the investigation, Ryan also spoke to Petitioner and Lindon, who stated he did not require Petitioner to send e-mails to everyone on the team. App. 80, ¶ 56. Ryan concluded there was no evidence Barrett's e-mail was inappropriate or that it was racially discriminatory or retaliatory. App. 81, ¶ 57.

B. The Proceedings Below

1. The District Court

Petitioner has a long history of filing meritless discrimination charges and lawsuits against his employer alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. App. 23-30, 33-47. On April 1, 2002, Petitioner filed his first Charge with the Equal Employment Opportunity Commission ("EEOC") against AT&T Mobility (the "2002 charge") alleging he was discriminated against based on his race with regard to promotions, training, and bonuses from March 15, 1993 through March 29, 2002. App. 71, ¶ 19. Petitioner did not file a lawsuit based on the allegations of race discrimination contained in the 2002 charge. App. 71, ¶ 20.

On May 29, 2003, Petitioner filed a second EEOC charge (the "2003 charge") claiming race discrimination and retaliation, including allegations he was denied overtime and received a negative performance review. App. 71, ¶ 21. Petitioner filed suit (*Graham, et al. v. Cingular Wireless et al.*, Case No. 04 C 540), alleging he was retaliated and discriminated against based on his race in regard to promotions, assignments, and overtime pay, and was subjected to a hostile work environment due to racial graffiti. App. 71, ¶¶ 22-3. The District Court dismissed Petitioner's complaint in March 2004, and the Seventh Circuit Court of Appeals dismissed Petitioner's untimely appeal for lack of jurisdiction (No. 05-1370). App. 71, ¶ 24.

In November 2004, Petitioner filed his third EEOC charge (the "2004 charge") alleging he was retaliated against for filing his 2003 charge by receiving a "derogatory" performance evaluation; being told by a co-worker that a manager made an allegedly racist comment; being directed to "copy all of [his] e-mails and send them to [his] direct manager and work group;" having a "built by Irish crew" sign placed in an area in which he worked; being denied his request to have a union representative present during a meeting concerning his evaluation; and having "false and defamatory" statements made about him to his personal injury attorney. App. 72, ¶ 25; App. 160-61.

In February 2005, Petitioner filed the underlying lawsuit in this action alleging AT&T Mobility violated Title VII through a pattern and practice of discrimination and by discriminating and retaliating against him for his first lawsuit. App. 72, ¶ 25; App. 160-61. On April 5, 2005, AT&T Mobility moved to dismiss Petitioner's retaliation claim in part, and his race discrimination and "pattern and practice" claims in their entirety. R. 7, 9. District Judge Elaine E. Bucklo granted AT&T Mobility's Motion to Dismiss on October 21, 2005, ruling Petitioner's 2004 charge stated only that he had been "discriminated against because of retaliation." App. 31-32. The Court also noted that only the "retaliation" box was checked on the charge form. *Id.* Further, the Court determined there was "no suggestion in the EEOC charge Petitioner felt he had been discriminated against because of his race" and dismissed the discrimination claim. App. 32. The Court also struck certain allegations of the retaliation claim not raised in the 2004 Charge as outside the scope of the Charge and

dismissed the "pattern and practice" claim because the Charge's allegations pertained to Petitioner alone. *Id.*

On November 1, 2005, Petitioner filed his fourth EEOC charge (the "2005 charge") in which he realleged the dismissed discrimination allegations as well as additional acts of alleged discrimination and retaliation by AT&T Mobility in 2004 and 2005. App. 73-4, ¶¶ 27-8; App. 161. Shortly thereafter, Petitioner then filed an amended complaint in this case alleging retaliation and race discrimination claims based on acts alleged in his 2005 charge. App. 33-47; App. 74, ¶ 29; App. 161.

AT&T Mobility moved to dismiss the race discrimination claim in the amended complaint as untimely and to strike other untimely allegations from the amended complaint based on *res judicata*. R. 28, 29. On March 6, 2006, the District Court granted AT&T Mobility's Motion to Dismiss in part. R. 43. It ruled Petitioner could only allege race discrimination based upon acts occurring within 300 days of the filing of his 2005 EEOC Charge, and that he could not rely on a continuing violation theory to pursue earlier discrimination allegations. The District Court also ruled Petitioner's untimely allegations were barred under the doctrine of *res judicata* due to the dismissal of his first lawsuit (*Graham, et al. v. Cingular Wireless, et al.*, Case No. 04 C 540) and his failure to timely file an EEOC charge. *Id.*

Thereafter, AT&T Mobility moved for summary judgment on Petitioner's remaining claims. App. 48-96. Petitioner filed a response which was limited to a response to AT&T Mobility's Local Rule 56(a)(1)

Statement of Undisputed Material Facts. Petitioner did not file a memorandum of law or proffer any evidentiary submissions other than a lengthy affidavit containing numerous exhibits. R. 57, 58. In its Order granting AT&T Mobility's Motion, the District Court ruled it could not consider portions of Petitioner's affidavit that were outside his personal knowledge, reliant on hearsay, speculation, or unsupported opinion. App. 158. The Court also ruled that much of Petitioner's response to AT&T Mobility's Local Rule 56.1(a)(3) Statement did not comply with Local Rule 56.1(b)(3) because it did not contain specific references to affidavits, parts of the record, or other supporting materials. App. 158-59.

With respect to Petitioner's discrimination and retaliation claims, the Court ruled Petitioner was unable to establish a *prima facie* case because he could not show any of the instances of alleged discrimination and retaliation constituted an adverse action and because he did not identify any similarly situated employees who were treated more favorably. App. 165-69. To the extent Petitioner attempted to assert a hostile work environment claim, the District Court found the incidents complained of were race-neutral and not so severe or pervasive as to alter the conditions of his employment. App. 170-71. Finally, the Court ruled that even if the incidents were actionable harassment, AT&T Mobility was not liable because it had promptly investigated Petitioner's complaints and taken action when appropriate. App. 173-74.

On July 11, 2006, Petitioner filed a Rule 60(b)(6) Motion asking the District Court to reopen his case based on this Court's decision in *Burlington Northern*

& Santa Fe Ry. Co. v. White, 548 U.S. 53, 165 L.Ed. 2d 345, 126 S. Ct. 2405 (2006), decided after the District Court granted AT&T Mobility's Summary Judgment Motion. App. 177-99. The District Court denied Petitioner's motion. Applying *Burlington*, the District Court found several of the complained of actions would not have been materially adverse to a reasonable person. App. 202. The Court also found that even if other actions could qualify as materially adverse, Petitioner could not establish a *prima facie* case of retaliation because he had provided no evidence of similarly situated employees being treated more favorably, and that AT&T Mobility had provided legitimate, non-discriminatory reasons for all of the actions and Petitioner had not presented any evidence the reasons were pre-textual. App. 203-04. Accordingly, the Court denied Petitioner's motion.

On July 11, 2006, AT&T Mobility filed its Bill of Costs and memorandum in support, seeking $7,325.60 in court reporter and photocopying costs. R. 74, 75. More than two months later, Petitioner filed an untimely response in opposition to the Bill of Costs in which he did not contest the individual items, but instead argued the Bill of Costs itself was a retaliatory action within the meaning of *Burlington*. App. 14-22. The District Court entered AT&T Mobility's Bill of Costs in the amount requested. App. 13.

2. The Court of Appeals

Petitioner appealed the District Court's rulings to the Seventh Circuit Court of Appeals (Nos. 06-3020 & 06-3734). Petitioner argued the District Court erred in

dismissing his discrimination claims because the failure to check the "race" box on his 2004 EEOC charge form was a clerical error. Pet. App. 37. Petitioner also argued a genuine issue of material fact existed regarding his retaliation and pattern and practice claims and that the District Court misapplied this Court's holding in *Burlington* when it denied Petitioner's motion to reconsider. *Id.* Finally, Petitioner argued the District Court should strike AT&T Mobility's Bill of Costs because it would have a deterrent effect on others wishing to bring discrimination claims. *Id.*

The Seventh Circuit affirmed the District Court's rulings. Pet. App. 33-45. Regarding Petitioner's dismissed discrimination claims, the Seventh Circuit found Petitioner failed to satisfy the prerequisite of alleging a discrimination claim in his 2004 EEOC charge. Pet. App. 37-39. The Seventh Circuit analyzed Petitioner's retaliation claims using both the direct and indirect methods of proof. Applying the direct method, the Seventh Circuit found Petitioner's allegations insufficient. Pet. App. 40-41. Applying the indirect method, the Seventh Circuit found that "[e]ven assuming one or more of [Petitioner's] claims amounts to an adverse employment action," he failed to identify any similarly situated individuals treated more favorably and, therefore, affirmed the District Court's grant of summary judgment. Pet. App. 41.

Because Petitioner failed to properly develop his pattern and practice discrimination arguments in his brief, the Seventh Circuit found he waived those claims and affirmed the District Court's grant of summary judgment of that count. Pet. App. 42. The Seventh

Circuit also found the District Court did not abuse its discretion when it denied Petitioner's Rule 60 (b) (6) motion to reconsider based on this Court's decision in *Burlington*, which approved the approach previously employed by the Seventh Circuit. Pet. App. 42-43. Because the Petitioner failed to demonstrate how the district court improperly applied *Burlington*, the Seventh Circuit affirmed the District Court's denial of Petitioner's motion to reconsider. *Id.* Finally, the Seventh Circuit rejected Petitioner's assertion the Bill of Costs awarded by the District Court would dissuade a reasonable worker from making or supporting a charge of discrimination and, therefore, concluded the District Court did not abuse its discretion in awarding costs. Pet. App. 44.

REASONS FOR DENYING THE PETITION

I. Considerations Governing Review Of Petitions For Writ of Certiorari

This case is not one in which certiorari should be granted because it does not present any compelling reasons as required by Sup. Ct. R. 10 for granting the Petition. The Petition does not demonstrate the decision below conflicts with any decision of this Court or any Court of Appeal, nor that it implicates a federal question unaddressed by this Court. Indeed, the Petition makes no attempt to do so. Rather, the Petition essentially reiterates the arguments rejected by the Seventh Circuit Court of Appeals.

In sum, this is simply an unremarkable case in which the Seventh Circuit Court of Appeals found that the

District Court: 1) properly dismissed Petitioner's untimely and previously-litigated claims; 2) properly awarded summary judgment on Petitioner's remaining claims; and 3) did not abuse its discretion in awarding costs to AT&T. Furthermore, even if the Seventh Circuit Court of Appeals' decision was erroneous, that fact alone is insufficient to support granting the Petition. *See* Sup. Ct. R. 10 ("a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Petitioner has not carried his burden of demonstrating any "compelling reasons" for the Petition to be granted and, thus, the Petition should be denied.

II. The Decisions of the District Court Were Correct and, Therefore, Properly Affirmed By The Seventh Circuit

A. The District Court Did Not Abuse Its Discretion In Entering Costs Pursuant To Rule 54(d).

Rule 54(d)(1) of the Federal Rules of Civil Procedure provides, in relevant part, that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party. " Fed. R. Civ. P. 54(d)(1). In *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 108 S.Ct. 1130, 99 L.Ed. 2d 289 (1988), this Court noted a prevailing party "automatically is entitled to costs" unless the district court finds otherwise. *Id.* at 294. Thus, Rule 54 creates a presumption the district courts will award costs to the prevailing party and confers discretion on the district courts in considering requests

for costs. A district court's discretion is not without limit. *See Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 85 S.Ct. 411, 13 L.Ed. 2d 248 (1964) (noting Rule 54 does not give district judges unrestrained discretion to tax costs and the discretion afforded should be exercised sparingly with respect to expenses not specifically allowed by statute).

The District Court awarded AT&T Mobility costs for deposition transcripts and photocopying, costs which are expressly authorized by statute. *See* 28 U.S.C. § 1920. To overcome the presumption in favor of awarding costs, Petitioner argues the District Court should have denied costs outright because AT&T Mobility allegedly engaged in excessive discovery, "ran up" costs, and that its Bill of Costs was retaliatory. Petitioner's contentions are absolutely baseless.

The record below demonstrates Respondent simply availed itself of its statutory rights in seeking reimbursement of its costs. Petitioner's suggestion that AT&T Mobility's net worth should preclude it from recapturing reasonable costs is unsupported. Likewise, Petitioner's reliance on AT&T Mobility's counsel's March 2, 2006 e-mail as proof of retaliatory motive is misplaced. The e-mail, a response to Petitioner's counsel's request to provide authority for the position that a prevailing defendant is entitled to costs, and which sets forth the law related to recovery of costs, does not evidence a retaliatory motive. App. 22. Likewise, Petitioner's assertion AT&T Mobility purposely engaged in excessive discovery to increase costs is completely unsupported by the record. As the Court below noted, AT&T Mobility acted reasonably by

consistently attempting to narrow the scope of this case in response to Petitioner's repeated attempts to broaden it. As the record reflects, Petitioner asserted claims of discrimination going back ten years, which were either untimely or previously adjudicated. AT&T Mobility avoided discovery into these matters through its motions to dismiss, thereby streamlining the issues in the case. It further limited costs by taking only five depositions, all of persons Petitioner identified as witnesses who could support his substantive claims or damages claims, even though Petitioner identified over 100 witnesses in his Rule 26(a) disclosures. R. 7, 9, 28, 29, 92, Ex. A.[3] Based on these facts, the Seventh Circuit correctly rejected Petitioner's claim that AT&T Mobility needlessly "ran up" its costs to punish him for pursuing his claims. Pet. App. 44. Furthermore, because Petitioner's assertion that AT&T Mobility's Bill of Costs was retaliatory was never raised in an EEOC charge, this claim was not properly before the Courts below and, therefore, can provide no basis for granting the Petition.

Moreover, Petitioner's reliance on this Court's decision in *Burlington* is unavailing. First, the decision in *Burlington* did not exclude Title VII cases from the application of Rule 54 (d). Nothing in *Burlington* could

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[3] Even if the Seventh Circuit Court erred in its statement of the number of depositions AT&T Mobility took – which it did not – the result is the same. Petitioner asserts AT&T Mobility took "eleven plus" depositions in the case, apparently because its counsel questioned witnesses during portions of the depositions Petitioner noticed. Pet. 3. Whether AT&T Mobility took five depositions or twelve, the facts demonstrate AT&T Mobility conducted its defense in a reasonable manner and did not engage in excessive discovery.

reasonably be interpreted as stripping a Title VII defendant of its right to recoup costs as approved by Rule 54 (d). Second, an award of costs is not an "adverse employment action" under *Burlington* because it is not an act of the *employer*. Rather, it is an action of the district court, pursuant to long-established rules of procedure, requiring the losing party to reimburse the prevailing party for certain out-of-pocket expenses incurred in litigation. Moreover, through established procedures, the district court stands as a check to protect against any abuse.

Third, Petitioner's assertion that an award of costs would dissuade a reasonable employee from making or supporting a charge of discrimination is specious. A reasonable employee would not be dissuaded from pursuing a discrimination charge by the possibility that, at some point in the distant future, he might be required to pay costs *if* the case proceeded to litigation and the employer prevailed. The court-ordered payment of costs is entirely unrelated to the pursuit of a charge of discrimination at the EEOC or through the employer's internal complaint procedure. Rather, it follows from a decision to litigate a claim. However, the possibility of having to pay costs to a prevailing employer is unlikely to dissuade a reasonable plaintiff who has been a true victim of discrimination and stands to win substantial economic and non-economic damages, including possible compensatory and punitive damages, costs, and attorneys fees. To the extent having to pay costs would, and should, dissuade someone, such as Petitioner, from bringing meritless claims, then an intended purpose of Rule 54 (d) is served.

In sum, there is no factual or legal basis for Petitioner's argument that AT&T Mobility's Bill of Costs was, in fact, retaliatory. Accordingly, the Petition should be denied.

B. The District Court Properly Dismissed Petitioner's Race Discrimination Claim For Failure to Exhaust His Administrative Remedies.[4]

Petitioner argues the District Court improperly dismissed the race discrimination claim alleged in his original complaint because of a clerical error at the EEOC. Pet. 14-17. This argument entirely mischaracterizes the rulings below. The record reflects the District Court dismissed Petitioner's race discrimination claim because he did not allege race discrimination in his charge. R.9, Ex. A. Even if the Court erred, such error was harmless because the District Court ultimately properly determined Petitioner could not establish a *prima facie* case of retaliation based on the same allegations and applying the same legal standard. Accordingly, the District Court's order should be affirmed.

The District Court's dismissal of Petitioner's discrimination claim was entirely proper. A plaintiff may not bring Title VII discrimination claims not alleged in an EEOC charge. *See Alexander v. Gardner-Denver Co.*,

[4] Petitioner's remaining arguments are certainly not a model of clarity. Accordingly, AT&T Mobility sets forth herein the arguments which most clearly demonstrate the decisions of the Courts below were correct and, therefore, that there is no basis for granting the Petition.

415 U.S. 36, 47 39 L.Ed. 2d 147, 94 S.Ct. 1011 (1974). The record below amply demonstrates Petitioner's 2004 charge focused exclusively on alleged retaliation. R. 9, Ex. A. However, retaliation and discrimination claims are unrelated and an administrative charge of one cannot support a civil suit for the other. The Seventh Circuit has held that all claims of discrimination are cognizable that are like or reasonably related to the allegations of the charge and growing out of such allegations. *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.*, 538 F.2d 164, 167 (7th Cir. 1976) (*en banc*) (quoting *Danner v. Phillips Petroleum Co.*, 447 F.2d 159, 162 (5th Cir. 1971)), certiorari denied, 429 U.S. 986, 97 S. Ct. 506, 50 L. Ed. 2d 598 (1976). The standard is a liberal one in order to effectuate the remedial purposes of Title VII. *Id.* at 167-168. Other circuits are in accord with this analysis. *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 928 (11th Cir. 1983); *Satz v. ITT Financial Corp.*, 619 F.2d 738, 741 (8th Cir. 1980); *McBride v. Delta Air Lines, Inc.*, 551 F.2d 113, 115 (6th Cir. 1977), vacated on other grounds, 434 U.S. 916, 54 L. Ed. 2d 273, 98 S. Ct. 387 (1977); *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 398-399 (3d Cir. 1976), certiorari denied, 429 U.S. 1041, 50 L. Ed. 2d 753, 97 S. Ct. 741 (1977); *Joslin Dry Goods Co. v. EEOC*, 483 F.2d 178, 184 (10th Cir. 1973); *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973); *Graniteville Co. (Sibley Division) v. EEOC*, 438 F.2d 32, 41-42 (4th Cir. 1971); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 462-467 (5th Cir. 1970). However, the Seventh Circuit correctly recognizes that the gist of a retaliation claim is that the employer lashed out against an employee for exercising a right, not out of animosity

for his race. *See Sitar v. Indiana Dept. of Transp.*, 344 F.3d 720, 726-27 (7th Cir. 2003) (finding plaintiff could not proceed with her discrimination claim based upon an EEOC charge alleging retaliation).

Here, the District Court properly determined Petitioner did not advance a race discrimination claim in his 2004 EEOC charge. First, nowhere in the particulars of his charge did he indicate or even mention he believed he had been discriminated against because of his race or that the alleged retaliatory actions were also racially discriminatory. R. 9, Ex. A. Rather, Petitioner specifically stated, "I believe I have been discriminated against because of *retaliation*, in violation of Title VII of the Civil Rights Act of 1964." (emphasis added). *Id.* Second, Petitioner checked only the retaliation box on his charge. *Id.* Contrary to Petitioner's assertions (Pet. 15-17), Petitioner's claim of racial discrimination cannot be reasonably inferred from the allegations of retaliation in his 2004 EEOC charge and therefore was properly dismissed. Petitioner's assertion AT&T Mobility should have known his 2004 EEOC Charge raised allegations of race discrimination based on its knowledge of his race and prior charges is meritless and its application here would defeat the statutory scheme established by Title VII favoring "an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party [is] permitted to file a lawsuit" (*See Alexander v. Gardner-Denver Co.*, 415 U.S. at 44) while at the same time imposing an unrealistic requirement of clairvoyance on the employer.

Furthermore, even if the District Court did err in dismissing Petitioner's discrimination claim, such error was harmless because the District Court properly determined Petitioner could not establish a *prima facie* case of retaliation based on the same allegations upon which his dismissed race claim was based. The incidents underlying both Petitioner's retaliation and discrimination claims were identical. App. 23-30, 33-47. The District Court ultimately ruled Petitioner failed to establish a *prima facie* case of retaliation based on these incidents in that none of them constituted adverse actions (under both *Burlington* and pre-*Burlington* standards) and Petitioner had not identified any similarly situated employees who were treated more favorably. App. 157-75, 201-05. Moreover, the District Court determined Petitioner proffered no evidence demonstrating Respondent's legitimate non-discriminatory reasons for the actions were pre-textual. App. 204. Accordingly, had Petitioner been allowed to proceed on the discrimination claim in his original complaint, the end result would have been the same.

C. The District Court Properly Dismissed Petitioner's Untimely Race Discrimination Claims.

Under Title VII, to proceed in federal court, a plaintiff must have filed a charge of discrimination with the EEOC describing the basis for the allegations within 300 days of the date of their occurrence. 42 U.S.C. § 2000e-5(e). A plaintiff cannot circumvent the statute of limitations by filing a new EEOC charge mirroring the allegations contained in a retaliation charge filed a year earlier but merely checking the discrimination box

on the charge form. That is what Petitioner attempted to do in this case.

Petitioner's contention that the time barred discrimination claims were part of a continuing violation and, hence, timely is without merit. In *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 114-117, 153 L.Ed. 2d 106, 127 S.Ct. 2061 (2002), this Court held the continuing violation doctrine applies only to hostile work environment claims. With respect to discrete acts of alleged discrimination of the type alleged by Petitioner, each act starts a new clock for filing charges, and the clock starts on the date that the act occurred. *Morgan*, 536 U.S. at 113. Any discrete discriminatory acts that fall outside the statute of limitations are time-barred even though they may relate to other discrete acts that fall within the statute of limitations. Similarly, timely filed discrete acts cannot save discrete acts that are related but not timely filed. *Morgan*, 536 U.S. at 112 ("Discrete acts that fall within the statutory time period do not make timely acts that fall outside the time period").

Here, the time-barred discrimination allegations in Petitioner's Amended Complaint all pertained to discrete allegedly discriminatory acts. R. 27, ¶¶ 6, 8, 11-18, 21. Petitioner's assertion of timely discrete acts elsewhere in his complaint does not save these untimely acts. R. 27, ¶¶ 10, 19-20. Furthermore, even if the District Court did err in dismissing Petitioner's untimely allegations of discrimination, such error was harmless because the District Court ultimately properly determined that Petitioner could not establish a *prima facie* case of retaliation based on the same allegations.

The District Court also properly dismissed Petitioner's other untimely allegations because they were or could have been raised in his first lawsuit against Respondent, which was dismissed. R. 43. Accordingly, under the doctrine of *res judicata*, Petitioner was precluded from re-litigating these claims.

D. The District Court Properly Granted Summary Judgment On Petitioner's Remaining Retaliation Allegations.

As a result of the Court's order granting AT&T Mobility's second motion to dismiss, Petitioner's remaining allegations were that AT&T Mobility discriminated and retaliated against him by: requiring him to email his superiors and co-workers about his job progress throughout the day; permitting co-worker Barrett to email him in 2005 to ask him to stop sending numerous emails throughout the day; requiring him to follow "strict instructions" from his supervisors; denying his request to receive earlier technology training due to his seniority as allegedly required by the union's agreement with AT&T Mobility; denying him a laptop mount and a cellular telephone in a timely fashion; and that AT&T Mobility retaliated against him by giving him a "derogatory" performance evaluation in 2004; through co-worker Dan Delaney's 2004 email to Petitioner asking him to stop sending him copies of his emails at the end of the day; through union steward and co-worker Michael Morrissey's 2003 email to Petitioner and all other union members telling them that "ratting people out" could result in dismissal from the union; through James Gurga's racial statement to Petitioner's co-worker that the co-worker might be suspected of

vandalism because he "had a tan;" through Morrissey's placement of a "built by Irish crew" sticker at a cellular site located in Petitioner's work zone; by denying Petitioner's request to have a union representative present when he met with his supervisor regarding his performance review; and through AT&T Mobility's attorney's allegedly "false and defamatory" statement about Petitioner in a settlement letter sent to Petitioner's personal injury attorney. App. 33-47; App. 74-75, ¶¶ 31-32; App. 161-63; R. 43.

Petitioner alleges these incidents present material facts which should have precluded summary judgment on his claims. Pet. 17-20. However, in the proceedings below, Petitioner failed to address several of the grounds on which the District Court granted summary judgment. He made absolutely no argument the District Court erred in: (1) dismissing his race discrimination claim; (2) dismissing his hostile work environment claim; (3) finding he failed to establish similarly situated employees were treated more favorably; or (4) finding AT&T Mobility's legitimate, non-discriminatory reasons for its actions were pre-textual. Petitioner's failure to argue the District Court erred with respect to essential elements of his claims in the proceedings below should, therefore, preclude this Court's granting of the Petition.

1. The District Court properly determined Petitioner could not establish a *prima facie* case of retaliation or discrimination.

Under the indirect method of proof, a plaintiff must first establish a *prima facie* case. *See generally,*

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). If he is able to do so, the burden shifts to the defendant to proffer a legitimate, non-retaliatory or non-discriminatory reason for its actions. *Id.* The burden then shifts back to the plaintiff to establish that proffered legitimate reason was in fact pre-textual. *Id.*

Here, to establish a *prima facie* case of retaliation, Petitioner must show: he engaged in protected activity; was subject to an adverse employment action; was performing his job satisfactorily; and that no similarly situated employee who did not engage in protected activity suffered an adverse employment action. *See Burks v. Wis. Dept. of Transp.*, 464 F.3d 744, 759 (7th Cir. 2006), applying *McDonnell Douglas Corp.* 411 U.S. at 792. Here, Petitioner did not establish the second and fourth elements of the *prima facie* case.

a. Petitioner was not subjected to any materially adverse actions.

A materially adverse action is one that "must be harmful to the point that [it] could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington*, 548 U.S. at 53. Materially adverse employment actions do not include trivial harms, petty slights, or minor annoyances. As this Court reasoned in *Burlington*, "it is important to separate significant from trivial harms." 548 U.S. at 53. Title VII does not set forth "a general civility code for the American workplace." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998). Accordingly, an "employee's decision to report discriminatory behavior

cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Burlington*, 548 U.S. at 53.

This Court's holding in *Burlington* is entirely consistent with prior Seventh Circuit law. Indeed, this Court stated the Court agreed with the Seventh Circuit's formulation of the test for actionable retaliation. *Burlington*, 548 U.S. at 53. Here, the undisputed evidence reflects Petitioner suffered no materially adverse actions. None of the acts Petitioner complains of would have dissuaded a reasonable person from complaining of discrimination. Rather, as outlined below, all of the acts upon which Petitioner based his retaliation and race discrimination claims were trivial harms, petty slights, or minor annoyances which do not constitute material adverse actions. App. 202. Indeed, from the beginning of Petitioner's employment through the relevant time period covered by this lawsuit, Petitioner was never suspended, disciplined, or even reprimanded in any fashion. App. 68, ¶ 4; App. 165.

Petitioner's satisfactory performance evaluation was not a materially adverse action. Contrary to Petitioner's assertions, it is undisputed he did not receive a negative performance evaluation, but rather a satisfactory evaluation. App. 75, ¶ 33. His personal dissatisfaction with some of the comments therein does not render the evaluation a materially adverse action. Moreover, AT&T Mobility fully investigated his complaint and determined the evaluation was well-grounded. App. 76-77, ¶¶ 36-37.

Petitioner was not required to send daily e-mails regarding his work activities, and his voluntary decision to do so did not constitute a materially adverse action. Petitioner conceded he was never required to send daily e-mails regarding his work activities to his supervisors or co-workers, but rather took it upon himself to do so. App. 78, ¶ 45. Even if he was required to send daily e-mails, such requirement would not have dissuaded a reasonable person from complaining of discrimination.

Petitioner's co-workers' comments regarding his daily e-mails were not materially adverse actions. Clearly, the e-mails from co-workers Barrett and Delaney regarding Petitioner's e-mail usage are not adverse actions. App. 79-82, ¶¶ 51-66; App. 170-71. First, Barrett and Delaney are not Petitioner's supervisors and could not direct his work or discipline him. App. 80-82, ¶¶ 55, 60, 65; App. 170-71. Second, their requests were nothing more than everyday communications between co-workers regarding business-related activities. Petitioner's subjective upset or embarrassment does not make the requests adverse actions. Moreover, there is no evidence Barrett and Delaney were even aware Petitioner had complained of discrimination when they sent the e-mails, and it is undisputed Barrett has sent similar e-mails to white employees. App. 81, ¶¶ 58-59, 62.

Morrissey's e-mail to all union members regarding "ratting out" other employees was not a materially adverse action.[5] Morrissey's e-mail to the

[5] The District Court correctly determined this allegation was time-barred because it occurred more than 300 days before the filing of the November 2004 EEOC charge. 42 U.S.C. § 2000e-5(e).

entire field engineering department was in no way a materially adverse action. It is undisputed the e-mail was completely unrelated to Petitioner and Morrissey was unaware of Petitioner's EEOC charge and complaint at the time he sent the e-mail. App. 69-70, ¶ 13; App. 84-85, ¶¶ 73-74, 76.

The small "built by Irish crew" label Petitioner's co-worker Morrissey placed on the door of a movable cell tower was not a materially adverse action. Morrissey had no idea the movable cell tower would be placed in one of Petitioner's sites, and was unaware Petitioner had filed any EEOC charges or complained of discrimination. App. 85-87, ¶¶ 77, 81, 83. Furthermore, when Petitioner complained to human resources, Morrissey was immediately required to remove the label, reprimanded, and instructed not to place such labels on company property in the future. App. 85-86, ¶ 79.

Respondent's decision to disallow Petitioner from bringing a union representative to a performance appraisal meeting was not a materially adverse action. Petitioner had no right to union representation at a meeting concerning his petty complaints about his satisfactory performance evaluation. App. 87-88, ¶ 86. Indeed, Respondent's refusal to allow Petitioner to have union representation was based on Company policy, the collective bargaining agreement, and this Court's decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 43 L.Ed. 2d 171, 95 S.Ct. 959 (1975). The policy, CBA, and case law clearly establish that when a meeting with management has nothing to do with disciplinary action, an employee has no right to union representation. App. 87-88, ¶ 86. Petitioner's subjective desire for a union

representative at the meeting does not render AT&T Mobility's entirely lawful refusal of the request a materially adverse action.

The letter from Respondent's workers' compensation attorney was not a materially adverse action. The letter Petitioner complains of was nothing more than a routine settlement communication between attorneys, and thus in no way would have dissuaded a reasonable person from complaining of discrimination. App. 89-90, ¶¶ 94-95; App. 170-71.

The order in which Petitioner attended the UMTS training class was not a materially adverse action. Because AT&T Mobility was not required to train the Field Engineering department employees in order of seniority, because Petitioner received the training, and because there was no advantage to the order in which technicians were trained, the fact Petitioner was not the first person to receive the training was not a materially adverse action.

Respondent provided Petitioner with a laptop mount and wireless phone. Petitioner's petty complaints about purported delays in the processing of his request for a laptop mount and a new wireless phone do not rise to the level of materially adverse actions. App. 92-95, ¶¶ 105-117. Any delays were due to routine problems ordering equipment. App. 93-95, ¶¶ 109-10, 116. Clearly, a delay in receiving work-related products is not a materially adverse action.

A stray comment by a non-decision-maker does not constitute a materially adverse action.

Petitioner's allegation regarding Gurga's "tan" comment is not only untimely because it occurred more than 300 days before the November 2004 EEOC charge, but it is also not actionable as a matter of law. App. 72, ¶ 25; App. 82-83, ¶ 67. The ambiguous and innocuous comment was purportedly made more than three years ago by a non-decision-maker, outside of Petitioner's presence to Petitioner's co-worker. App. 69, ¶ 10; App. 82-83, ¶¶ 67-70. Petitioner never complained about the comment to AT&T Mobility's Human Resources Department. App. 83, ¶ 70. Because the purported comment had absolutely no effect on Petitioner's employment and no relevance to the claims at issue in this case, it should not even have been considered by the Courts below. In any event, such a temporally remote and vague comment, not directed at the complaining employee, would not have dissuaded a reasonable person from complaining of discrimination.

b. The District Court properly determined that Petitioner did not identify any similarly situated employees who were treated more favorably.

In order to establish a *prima facie* case of retaliation or discrimination, Petitioner must also show a similarly situated employee was treated more favorably. The District Court properly found Petitioner presented no evidence that similarly situated employees who had not complained about discrimination or who were not in his protected category were treated more favorably.

For example, with regard to his 2003 evaluation, Petitioner admitted he is simply guessing white employees received more favorable appraisals. App. 77, ¶ 38. He also concedes he has never seen the performance appraisals of his co-workers, was not present at any of their performance appraisal meetings, and cannot identify any employee who received higher ratings. *Id.* Likewise, no employees, regardless of race or protected activity, were permitted union representation at performance review meetings or other non-disciplinary meetings. App. 87-89, ¶¶ 86, 88-90, 92-93. With respect to the distribution of equipment, Petitioner admitted he was not aware of any employees treated differently with regard to equipment, or who received equipment more expeditiously. App. 92-94, ¶¶ 107, 111-12. With respect to the UMTS training, there were several white field technicians with more seniority than Petitioner who received the training after Petitioner. App. 90-91, ¶¶ 98, 101. With respect to the e-mails, it is undisputed Barrett also asked white employees to limit the frequency of their e-mails (App. 81, ¶ 59) and Morrissey sent the "ratting out" e-mail to all union members regardless of their race or whether they had made complaints of discrimination. App. 84-85, ¶¶ 71, 76. Because Petitioner failed to identify any similarly situated employees who were treated more favorably, he failed to establish a *prima facie* case and the District Court properly granted summary judgment and the Petition should be denied.

2. The District Court properly determined that even if Petitioner could make out a *prima facie* case, Respondent's actions were based on legitimate business reasons which were not a pretext for retaliation.[6]

Because the District Court properly found Petitioner could not establish a *prima facie* case of retaliation or discrimination, there was no need to address whether AT&T Mobility's legitimate reasons for its actions was pre-textual. However, even if Petitioner was able to establish a *prima facie* case, AT&T Mobility proffered legitimate business reasons for its actions, and Petitioner cannot establish these reasons are pre-textual. In order to establish pretext, Petitioner must show AT&T Mobility's legitimate reasons were not the actual reasons for the purported adverse employment actions, but rather that his race or his filing of a discrimination charge or complaint was the real reason. *See St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 508, 125 L. Ed. 2d 407, 113 S.Ct. 2742 (1993). Because a Title VII claim requires intentional discrimination, the pretext inquiry necessarily focuses on whether the employer's stated reason was honest, not whether it was accurate. If the employer honestly believed in its reasons, the plaintiff loses even if the reasons are foolish, trivial, or baseless. Courts do not

[6] Because the District Court found Petitioner could not establish a *prima facie* case, it did not reach the other prongs of the burden shifting scheme in its summary judgment decision. App. 175. However, in its decision denying Petitioner's Rule 60(b) motion, the District Court did ultimately find Petitioner had failed to create an issue of fact that Respondent's legitimate non-retaliatory reasons were pre-textual. App. 203-04.

sit as a super-personnel department that reexamines an entity's business decision and reviews the propriety of the decision. Moreover, it is not sufficient for Petitioner to merely establish the reasons were doubtful or mistaken. Pretext does not mean a mistake, but rather a lie, specifically, a phony reason for some action.

Here, the District Court found Petitioner did not present any evidence that Respondent's legitimate reasons for its actions were pre-textual. App. 204. Accordingly, the District Court properly granted summary judgment in favor of Respondent and the Petition should be denied.

E. The District Court Did Not Abuse Its Discretion In Denying Petitioner's Rule 60(b)(6) Motion To Reconsider.

Petitioner argues the Courts below misapplied this Court's holding in *Burlington*, and that a proper application would change the outcome of this case. However, Petitioner offers no argument as to why the complained-of actions were materially adverse. Moreover, the District Court's well-reasoned opinion reflects that it did not abuse its discretion in determining that, even under *Burlington*, Petitioner failed to establish a *prima facie* case of discrimination or retaliation.

As the District Court properly found, no reasonable person in Petitioner's position would view the actions he has complained of as materially adverse. App. 202. For instance, no reasonable person would be deterred from filing an EEOC charge because of a co-worker's

request to send fewer e-mails; purported delay in receiving a laptop mount; or any of the other trivial acts complained of by Petitioner. App. 202. Instead, all of these acts fall squarely in the realm of petty slights and minor annoyances exempted from the category of material adverse actions by this Court. "We speak of *material* adversity because we believe it is important to separate significant from trivial harms. . . . An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Burlington*, 548 U.S. at 53.

Furthermore, as the District Court itself noted, even assuming the remaining acts of "retaliation" Petitioner complained of were "materially adverse," Petitioner still did not establish a *prima facie* case because he did not identify any similarly situated employees who filed charges or complaints or were outside his protected class and were treated more favorably. App. 166-67, 203. Thus, the District Court gave Petitioner the benefit of the doubt with respect to certain aspects of his retaliation claim, i.e. that although certain of the complained of conduct might be materially adverse, it makes no difference here because Petitioner still failed to establish another element of his *prima facie* case. App. 203. Finally, as the District Court properly found, even if Petitioner were able to establish a *prima facie* case, Petitioner failed to establish that any of Respondent's legitimate, non-retaliatory reasons for its actions were pre-textual. App. 203-04. The decisions of the Courts below on all these issues were entirely correct and consistent with this Court's prior rulings. Accordingly, the Petition should be denied.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Therefore, AT&T Mobility respectfully requests that the Petition be denied.

Respectfully submitted,

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No. 07-1020

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In The

Supreme Court Of The United States

Christopher A Graham

Petitioner.

-against-

AT&T Mobility, LLC,

Respondent.

BRIEF IN REPLY TO OPPOSITION

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

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E. REPLY TO COUNTER STATEMENT

Petitioner (Graham) has presented again, again and again in numerous forms of physical evidence to respondent which showed a racially hostile and discriminatory work environment where he was treated differently from similarly situated white employees by his managers and his director Timothy Kaufenberg.

The evidence in support of petitioner's discrimination and retaliation claims are clear. There are numerous contradictions in the testimonies of AT&T's agents like John Coffey and Timothy Kaufenberg, petitioner's managers, the truth have been presented to this court in petitioner's Petition for Writ of Certiorari. There are numerous disputed issues relevant for a jury trial.

The reality of petitioner's hostile experiences at the hands of his employer (AT&T) is vastly different from what the respondent would lead this court to believe. Petitioner does not have the time and resources to properly respond to the made up arguments of respondent who in pretext has continually tried to explain away factual discriminatory acts against him, while the discrimination against him continues.

FACTUAL BACKGROUNDS OF THE CASE

Petitioner can only respond and convey to this court what he knows to be true. Arguments presented by respondent in opposition to petitioner's brief is pretext and are being used to escape liability for AT&T.

Respondent is attempting to cover up a continued racially hostile work environment for black workers like Graham. Respondent has not showed any legitimate reasons for the discriminatory, retaliatory and hostile acts against petitioner.

Respondent has presented no evidence anywhere in discovery or in the record that any similarly situated white employees were treated the same as Graham, as suggested on page 4 of respondent's brief in opposition, The only evidence presented by respondent is the self serving affidavits of some of its white employees. The evidence in the record show that Graham was treated less favorably[3].

[3]**As discovery required, Petitioner asked and requested that the reviews of all similarly situated white employees in his work group be released as proof that the type of feedback in his evaluation was not consistent with those of his white coworkers, and was in fact less favorable than whites and based on retaliation and discrimination. AT&T refused to release those appraisal records in violation of discovery rules.**

It is a fact that the only evidence in the record that respondent made available in discovery was the list of scores that showed Graham last on the list proving that Graham was treated less favorably.

From 1993 to the present Graham's work ethics at AT&T has been exceptional, as supported by his 2001 appraisal and those before. Petitioner has a high moral and ethical standard which he credits to his religious beliefs and his commitment to his family and his church, his ethical work habits is continuously recognized by those outside his department. Petitioner prides himself in his work.

DISCRIMINATORY INTENT

Evidence that the review document given by John Coffey AT&T document marked **D00533** also Graham's document marked **EXHIBIT-R1-3, (App. 353)** was retaliatory is John Coffey being sent an email from David Giesfeldt, a Terr III engineer, commending Graham's work and Coffey purposely withholding the email for 22 days and did not give it to Graham. Petitioner then found out about the positive email from Giesfeldt and Jeff Bartos, witnesses in this case, petitioner had to request the email from his manager Coffey. Furthermore on page 2 section 2 of the same document, **(App. 353)** Coffey writes "Chris needs to put forth more effort in building a better working relationship, and creating better communication between team members and management." In the Coach and Development section of Graham's 2002 review marked **APP. 249** exhibit **D00540**

states "Increased communication between Chris and myself and his peers is needed to contribute towards a more cohesive team environment. Chris is knowledgeable in a variety of different network areas and I would like to see him share that knowledge with his team members who may be new to a task." Kaufenberg and Coffey referred to this section when they told Graham to send daily emails.

It is well known at AT&T that good communication skills are a prerequisite for any potential employee and or present employee to advance. The appraisal permanently damaged petitioner's work history. If the appraisal was the only evidence presented, and occurred after plaintiff opposed discrimination (EEOC complaint) taken in its proper context by itself, it is enough for trial.

A recorded conversation with Larry Barrett a white similarly situated employee, in which Barrett admitted that he, unlike Graham, was not asked by his manager John Coffey to send daily emails reporting his daily work. Barrett admitted that his manager did not know what he did in the field unlike Graham who was told by the same manager John Coffey to send daily emails as to his daily work and to improve communication. This contradicts statements made on page 4 of respondent's brief of opposition.

AT&T treated white employees differently than Graham, the evidence shows that. This is an issue of dispute to be resolved by a jury. See Barrett's deposition or in Graham's affidavit in opposition to motion **(App. 208)**.

AT&T investigates itself, its ethics line is also investigated internally. Respondent didn't resolve any of the reported incidents the hostility is continuing as stated in petitioner's EEOC complaint form. No evidence in the record show that Cingular took any specific acts that constitute a prompt investigation prior to Graham filing his EEOC charges for this action. Cingular only made a self serving claim that it made findings in investigations, which was send to Graham while depositions were being conducted in this action.

White employees Larry Barrett and Russell Jender that saw the Kill the Nigger sign who were identified by the petitioner (Graham) to Cory Balonanski HR manager, was not punished or reprimanded for leaving the sign on Graham's secured cell site C033 instead Balonanski told Graham that that white employees were offended that he had reported the sign. This pattern of treatment by Barrett was typical of the department's hostility

In discovery to prove pattern and practice, Graham requested the log book that chronicled the technician's visits at site C033, respondent refused to produce the book and the district court took no action to force AT&T to comply with discovery rules.

Hostility against blacks were brought to the attention of respondent many times in an attempt to have respondent address and put a stop to a racially hostile environment, based on the provisions in its own stated Code of Business Conduct (COBC). Because petitioner opposed these acts of racial discrimination he became victim retaliation, continued discrimination and a racially hostile work environment.

None of the facts that petitioner (Graham) presented in this case were disputed by AT&T as not true instead respondent (AT&T) attempted to self define all the factual discriminatory and hostile acts as petty slights and annoyances. If respondent had maintained a nondiscriminatory (COBC) policy, petitioner would not have had any claims to present to the courts thru out his years of employment. There should not have been a hint of a racially hostility and or questionable acts of discrimination of any kind in respondent's work force, if it actually maintained a COBC and EEO policy.

DIFFERENT STANDARD IN TREATMENT

The victim (petitioner) has conveyed the existence of a hostile, retaliatory and discriminatory work environment based on his own experiences and the experiences of his black co-workers. Respondent's careless acts have caused petitioner serious harms physically, financially and emotionally because the discriminatory acts continues. Petitioner was and is treated differently from his similarly situated coworkers who are white.

The deposition testimony of John Coffey on December 20, 2005 "contradicts" the subsequent self-serving affidavit by Coffey or management. Also on Cingular's document marked **D00533,** which is also Graham's document marked **EXHIBIT-R1-3, (App. 353)** page 2 section 2, Coffey writes "Chris needs to put forth more effort in building a better working relationship, and creating better communication between team members and management."

Respondent's past reviews of Graham show that he was commended for his excellent communications skills, after his EEOC charge and complaints to management of continued hostile work environment, discrimination and retaliation his manager retaliated against him by giving him a derogatory review, this retaliation consisted of receiving a derogatory review from his manager, John Coffey, on May 2, 2003 **(APP. 248 and APP. 354 and April 7, 2004; (APP. 342)** management, his supervisor John Coffey and the Director Timothy Kaufenberg, gave Graham a demanded directive that petitioner send emails daily throughout the day, the directive was not required from other similarly situated white employees like Larry Barrett, and others. Management tolerated a pattern of hostile of acts against Graham.

Furthermore the evaluation given to petitioner was negative when compared to white employees' evaluation and this is based on the rating scale provided by defendants. **Exhibit 7**. Plaintiff did see a review rating of his coworkers: **Exhibit 7**. This exhibit shows a review rating of plaintiff's coworkers and plaintiff has the lowest rating.

In contrast petitioner's evaluation for 2001 show that petitioner was at the top of the rating with a rating of 4 out of a possible 5.

Petitioner "was reprimanded and disciplined verbally" in meetings about his 2002 and 2003 derogatory reviews by Timothy Kaufenberg and John Coffey his managers, after he had complained to respondent about discrimination, hostility and retaliation.

ISSUES OF FACTS

Petitioner (Graham) was disciplined in his 2002-2003 and 2003-2004 evaluations. Within these evaluations plaintiff was reprimanded for his conduct where management falsely accused him of deficiencies and demanded a change in his work performance. In petitioner's previous evaluation for 2001 he was highly rated a 4 out of a possible 5 in all areas for his excellent work performance.

Pattern and practice of discrimination
Contradictions in testimony
Timothy Kaufenberg petitioner's director although testified otherwise, does get involved in issues involving his subordinates. The May 2, 2003 and April 7, 2004 meetings with plaintiff's supervisor John Coffey and the plaintiff. **Exhibit 1a & 1b, and Exhibit 2, and Exhibit 3** show Mr. Kaufenberg responding to John Keemha's e-mail who is a white subordinate similarly to Graham. Another example of Mr. Kaufenberg getting involved with subordinates is his 1998 meeting with petitioner (Graham). At that meeting plaintiff complained about discrimination in the company's promotion policy based

on his race. In the first meeting with Mr. Kaufenberg he said he did not believe there was discrimination in his department. At a second meeting, Mr. Kaufenberg responded to plaintiff by saying "there might be discrimination in this Company, but not in my Department." Petitioner then said something must be done before this Company gets sued. Thereafter plaintiff attended a Microsoft Outlook class with Mr. Kaufenberg where he repeated his statement that "there might be discrimination in this Company, but not in my Department." This pattern of treatment continued on with the same director into the period of this lawsuit.

It was well known and general knowledge in the Department where Graham worked that he had had filed an EEOC complaint. Corey Bolanowski violated respondent's stated policy of confidentiality when she mentioned it to plaintiff's supervisor, John Coffey, see plaintiff's affidavit Exhibit R6-2, regarding the September 24, 2003 meeting. Cory admitted in her deposition that she did mention the EEOC complaint and lawsuit to plaintiff's supervisor John Coffey. In his deposition Mike Morrissey also admitted hearing about it Moreover, see plaintiff's affidavit, page 27, where co-worker Robert Flores spoke to him about his EEOC charges and lawsuit in December, 2002. Respondent now attempts to convey to this court that no one knew about petitioners EEOC complaints.

This case is not about isolated incidents of harmless acts or petty annoyances. Morrissey knew about Graham's EEOC complaint and knew where the cell site was headed when he placed the **"Built by Irish Crew"** label on the site. Graham knows Morrisey knew the location where the site was going, because Graham worked in the same capacity as Morriesy as an installer and trained Morrisey who was promoted before Graham. Site locations were determined before they were built; Morrisey knew this and was also responsible for drawing up the geographical site maps for all the technicians.

The removal of the label days after it was reported does not nullify the hostile and retaliatory act of Morrisey. Other examples of past documented acts that give rise to present claims was a graffiti sign painted by someone with access to secured company property that states **"Kill The Nigger"** is not a petty slight or an annoyance.

Respondent AT&T state in its (COBC) Code of Business Conduct that any acts of discrimination, hostility, retaliation or unethical behavior would be seriously dealt with, including and up to dismissal. Petitioner has filed numerous complaints with the EEOC only after addressing the violations to his employer who refused to properly address any of the violations and punish those responsible. Petitioner sued after exhausting his administrative options, he sought relief in the courts with other black employees. The courts have so far refused to send any of the cases to a jury all of petitioner's legitimate lawsuits were dismissed on technicalities and none of the merits were considered.

On petitioner's original claims the EEOC issued a right to sue letter but petitioner had no knowledge of the letter. A law firm Leeds Morelli and Brown requested the letter and illegally held it and allowed it to expire. LMB illegally negotiated with AT&T for a settlement threatening them with a class action suit, LMB walked away from case without filing the lawsuit leaving this petitioner and 50 employees/plaintiffs claims forever barred,

AT&T continued its discriminatory treatment, petitioner filed another EEOC claim which was brought before the Honorable Charles R Norgle, case # **04 C 0540** Norgle dismissed the case at a status hearing and violated *Circuit Rule 50* Norgle did not give a reason for dismissing the claims neither orally or in writing. AT&T then known as Cingular was never terminated and no where in the record Exhibit B does it show when Cingular Wireless was ever terminated.

LACK OF AN EQUAL OPORTUNITY POLICY AND A DIFFERENT STANDARD OF APPLICATION

A report named SCENDIS shows a lack of equal opportunity policy. Petitioner and 12 other black employees from different departments were interview by a group contracted by respondent to conduct interviews regarding working conditions and race. All the black workers including petitioner testified that AT&T then known as Cingular was racist. Petitioner and Dennis Moore a witness in this case requested the un-redacted version of the SCENDIS report in deposition, it was denied, the report shows that AT&T does not maintain an

EEO policy but rather maintains a workplace of hostility against blacks. An EEO statement on paper does not insure that those employees and or agents of respondent will obey it. There is no enforcement of the policy in field department where Graham works where it is racially hostile for blacks.

AT&T does not reprimand white managers and employees Code of Business Conduct (COBC) violations in petitioners department, while black employees are punish harshly for minor infractions, which leads to a racially hostile environment for blacks. Respondent's stated EEO policy is useless for those who it should protect.

Numerous disputed issues in the **Local Rule 56.1(b)(3) In Response to Defendant's Statement of Undisputed Facts** were dismissed because the lower court rejected the discrimination charges based on a error committed by the EEOC intake who did not check the race discrimination box limiting the scope and submission of evidence by petitioner to support his case. The EEOC itself do not subscribe to the lower courts decision the EEOC holds that the discrimination charges are viable since the charges were well spelled out in the particulars are section of the charge complaint. There is a conflict with the EEOC laws and the lower courts application of these laws.

REASONS FOR GRANTING THE PETITION

This case is an exceptionally important case for federal Title VII EEOC laws that have already been settled by this Court. The district and circuit courts did not consider any of the clear factual evidence contained within this civil action in favor of the petitioner. The lower courts only considered the respondent's and its agents self serving affidavits done in pretext in dismissing this case The district court judgment should be vacated and the case remanded for a jury trial on the basis of this Court's 2006 *Burlington v. White decision* and the evidence presented In this case a change in legal standards did occur.